IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-706

SOUTHERN PACIFIC TRANSPORTATION COMPANY,
UNITED TRANSPORTATION UNION AND
UNITED TRANSPORTATION UNION, LOCAL 807,
Petitioners,

v.

DUANE TERRELL BURNS, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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v.
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Petitioners, Southern Pacific Transportation Company, a corporation, United Transportation Union and United Transportation Union, Local 807, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in these proceedings on September 7, 1978.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit has not been reported in the Federal Reporter at the time of the filing of this Petition for Certiorari. The opinion is reproduced in the

Appendix at Page 1a. In addition, the Appendix contains the opinion of the United States Court of Appeals for the Ninth Circuit in *Anderson* v. *General Dynamics, et al.*, Case No. 77-2180 (September 7, 1978), which was consolidated for argument on appeal with the instant case and to which reference may be necessary to ascertain the grounds of the opinion in the instant case.

The opinion of the United States Court for the District of Arizona is not reported in Federal Supplement. It is reproduced in the Appendix at Page 10a and is reported at 11 FEP Cases 1441 (DC Ariz. 1976).

JURISDICTION

The Court of Appeals entered its opinion and judgment on September 7, 1978. This Petition for Certiorari is filed within ninety days of that date.

Jurisdiction to review the opinion and judgment in question by Writ of Certiorari is conferred on this Court by 28 U.S.C. § 1254(1):

> "Cases in the Courts of Appeals may be reviewed by the Supreme Court by the following methods:
>
> (1) By Writ of Certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree."

THE QUESTION PRESENTED FOR REVIEW

Does the duty of accommodation under the Civil Rights Act of 1964 require an employer and union to give preferential treatment to religious objectors to union security agreements by granting them complete exemption from the requirement of the collective bargaining agreement that all employees pay their fair

share of the collective bargaining costs in the form of monthly union dues and assessments.

THE STATUTES INVOLVED

The provisions of the federal statutes involved are lengthy and, therefore, are fully set forth in the Appendix. Pertinent portions of the statutes with their citations are set forth here.

The union security provisions of the Railway Labor Act provide, in pertinent part:

> "Notwithstanding any other provisions of this Act, or of any other statute or law of the United States, . . . any carrier . . . and a labor organization . . . authorized to represent employees . . . shall be permitted . . . to make agreements, requiring, as a condition of continued employment, that within sixty days following the beginning of such employment, . . . all employees shall become members of the labor organization representing their craft or class: . . ." 45 U.S.C. § 152, *Eleventh*.

The Civil Rights Act of 1964 provides in pertinent part as follows:

> "It shall be an unlawful employment practice for an employer . . . to discharge any individual . . . because of such individual's . . . religion . . . ." 42 U.S.C. § 2000e-2(a)(1).
>
> It shall be an unlawful employment practice for a labor organization . . . to cause or attempt to cause an employer to discriminate against an individual . . . ." 42 U.S.C. § 2000e-2(c)(3).
>
> For purposes of this title . . . [t]he term 'religion' includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably ac-

commodate to an employee's . . . religious observance or practice without undue hardship on the conduct of the employer's business. . . ." 42 U.S.C. § 2000e(j).

STATEMENT OF THE CASE

Respondent Burns is a brakeman-conductor for the Southern Pacific Transportation Company (hereinafter "Southern Pacific"). The collective bargaining representative for brakemen and conductors on the Southern Pacific is the United Transportation Union and its Local 807 (hereinafter "UTU"). In 1955, prior to Burns' employment and pursuant to Section 2, *Eleventh* of the Railway Labor Act, Petitioners Southern Pacific and UTU executed a collective bargaining agreement which required all future employees to become members of the UTU and thereafter maintain such membership in good standing. When Respondent Burns was employed by the Southern Pacific, he complied with the union security agreement, became a member of UTU and maintained his membership in good standing until 1974. That year he notified Southern Pacific and UTU that he was resigning his membership in the organization because of his religious belief in the doctrine of the Seventh Day Adventist Church that to belong or in any way financially support a labor organization was wrong. When the Union advised Burns that it would invoke the discharge provisions of the union security agreement if he did not continue to pay his monthly dues and assessments, Burns employed counsel with the assistance of the Seventh Day Adventist Church.

Burns' counsel met with the Union and took the nonnegotiable position that Burns would give absolutely no financial support to any collective bargaining agent.

This intractability foreclosed any discussion of other avenues of accommodation such as diversion of Burns' dues from the strike fund, etc. The Union did agree that Burns could terminate his membership in the organization and forego participation in any union activity but it was not willing to accede to Burns' unconditional demand that he be permitted to withdraw all financial support. Burns offered to contribute an amount equal to Union dues and assessments to a nonunion charity. This was unacceptable to the UTU because failure of Burns and others of similar belief to pay their fair share of the collective bargaining costs violated the collective bargaining agreement, shifted the burden of those costs to their fellow employees and constituted preferential treatment on the basis of their religion.

With the battle lines thus drawn, Burns filed a timely complaint with the Equal Employment Opportunity Commission charging that the Union's invocation of the discharge provisions of the union security agreement constituted discrimination against him on the basis of his religion. The Commission issued Burns a right to sue letter on February 20, 1974, and this suit was filed on March 1, 1974, alleging that to require Burns to pay periodic Union dues and assessments was religious discrimination in violation of the Civil Rights Act of 1964. 42 U.S.C. § 2000e et seq. The complaint sought injunctive relief prohibiting Burns' discharge, compensatory damages and attorneys fees. The parties agreed, however, that Burns could continue in his employment pending final disposition of this case and the claim for compensatory damages was dismissed.

In addition to the above, the District Court made the following findings of fact:

(1) Respondent Burns was sincere in his belief that he should not be a member of or financially support a labor organization; (2) The collective bargaining efforts of the UTU resulted in substantial employment benefits to Burns; (3) The representative efforts of the UTU within the framework of the Railway Labor Act contributed substantially to the fulfillment of the primary objective of that legislation, i.e., to promote industrial peace and to secure the uninterrupted flow of interstate commerce; (4) To fulfill its function, it was necessary that the Union expend large sums of money to pay the salaries and expenses of and to train, support and maintain the necessary complement of full and part-time union representatives and their supporting staffs, together with buildings, equipment and supplies for their use; and (5) In order to obtain the funds to perform its legislative duty, it is necessary for the union to collect from the employees an amount equal to their fair share of the collective bargaining expense.

The District Court further found that disproportionately high numbers of Seventh Day Adventists enter employment areas which provide union-free employment. If union security agreements are not enforced against Seventh Day Adventists, the railroad industry would provide an attractive employment opportunity for them because of its relatively high wages and the recent formidable growth of unions in fields that have in the past been union-free. If the plaintiff's position was sustained in this case, the Court said, it was likely that additional Seventh Day Adventists and other employees in the railroad industry with similar beliefs would refuse to pay dues and assessments to the union.

This, the Court found, would result in substantial hardship to the union.

With respect to plaintiff's offer to contribute the equivalent of UTU dues and assessments to a designated charity, the Court found that to be able to assure employees paying union dues that employees in Burns' situations were making a true contribution more would be required than the production of receipts for charitable donations. Investigation would be necessary to determine for each non-dues-paying employee the amount of his charitable contribution in the years immediately prior to discontinuing the payment of union dues and, in addition, investigation to be certain that the annual charitable contributions after discontinuing payment of union dues equal the total of his annual charitable contributions and dues and assessments before discontinuing payment. This investigation would require considerable time, effort and expense and would impose undue hardship on Southern Pacific and UTU.

The District Court also found that the employee hostility, dissention, friction and consequent loss of operating efficiency and safety which would result if plaintiff were to receive the benefits of collective bargaining without paying his fair share of costs would undoubtedly result in undue hardship on Southern Pacific. The operation of railroad trains, involving as it does assembling, switching and moving at high speeds large consists of railroad cars requires a team effort if it is to be efficient and safe. The testimony of both management and union witnesses, based on many years of experience, established a history of hostility and friction in the industry which is generated by the "no bill" or "free rider". This has a substantial adverse impact on safety and efficiency. The Vice President of Opera-

tions for Southern Pacific testified based on 39 years' experience that the failure to require Burns to pay his fair share of the collective bargaining costs would cause significant employee hostility, dissention and lack of communication. This would result in undue hardship to Southern Pacific in the form of reduced operational efficiency and safety. This opinion, the District Court said, appeared quite sound when consideration is given to the fact that Burns' fellow workers could very well be expected to have difficulty in accepting Burns' sincerity in being unable in conscience to pay union dues and assessments while he was able to accept the benefits he shares with fellow workmen made possible by their payment of dues.

Based on the testimony of a UTU Vice President with more than 30 years' experience in the industry, the Court found that the free-rider problems were serious enough on occasions to cause brother to be pitted against brother and father against son. Employee reactions to free riders in the past have included refusal of union members to speak to non-union members, union members bidding off assignments to avoid working with non-members and other conduct resulting in efficiency of operations. Specifically, the Court determined that employee reaction to Burns' failure to pay union dues and assessments was beligerence, hostility, threats of refusal to work with him and threats of refusal to pay dues to the Union if Burns is not required to do so. This was true even though these employees had been advised that Burns would make an equivalent charitable contribution.

On the basis of these findings, the District Court concluded that a reasonable accommodation had been offered to plaintiff and to accede to his demands of

complete financial severance from the Union would constitute an undue hardship on both Southern Pacific and UTU. A judgment in favor of Southern Pacific and UTU was entered and Burns appealed.

The Court of Appeals reversed. It held that the refusal of Southern Pacific and UTU to agree to some form of complete exemption from Burns' obligation under the collective bargaining agreement to pay union dues and accept in lieu thereof contributions of a like sum to charity was a violation of Title VII. The Court further concluded that the loss of Burns' dues, the administrative problems in policing "charitable substitutions" and the history of difficulty in the industry created by "free riders" were de minimis. Therefore, the Court said, the Company and Union failed in their burden to establish undue hardship.

REASONS FOR ALLOWANCE OF THE WRIT

The Court of Appeals held that no undue hardship is placed on an employer and union when they are required to violate their collective bargaining agreement in order to give preferential treatment to religious objectors to union security agreements by exempting them from the obligation to pay union dues. In so doing, the Court of Appeals has decided an important question of federal law in a way which conflicts with this Court's opinion in *Trans World Air Lines, Inc.* v. *Hardison,* 432 U.S. 63 (1977). Alternatively, if this question was not decided in *Hardison, supra.*, then the Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this Court.

In *Hardison, supra.*, the Court of Appeals had found that the employee, who objected to Saturday work for

religious reasons, should have been accommodated by arranging a swap between him and another employee for Saturday shifts even though this would have violated the seniority provisions of the collective bargaining agreement. Reversing the Court of Appeals, this Court held that the duty of accommodation under Title VII of the Civil Rights Act did not require the employer to violate an otherwise valid collective bargaining agreement. Speaking for the majority, Mr. Justice White said:

> "[W]e do not believe that the duty to accommodate requires TWA to take steps inconsistent with the otherwise valid collective bargaining agreement. Collective bargaining, aimed at effecting workable and enforceable arrangements between management and labor, lies at the core of our national labor policy, and seniority provisions are universally included in these contracts. Without a clear and express indication from Congress, we cannot agree with Hardison and the EEOC that an agreed upon senority system must give way when necessary to accommodate religious observances . . . Id. at 79.
>
> Had TWA nevertheless circumvented the seniority system by relieving Hardison of Saturday work and ordering a senior employee to replace him, it would have denied the latter his shift preference so that Hardison could be given his. The senior employee would also have been deprived of his contractual rights under the collective bargaining agreement. Id. at 80.
>
> Title VII does not contemplate such unequal treatment . . . [S]uch discrimination is proscribed when it is directed against majorities as well as minorities. Id. at 81.
>
> [A]bsent a discriminatory purpose, the operation of a senority system cannot be an unlawful employment practice even if the system has some discriminatory consequences. Id. at 82."

If Burns and others with similar beliefs are not required to pay their fair share of the cost of collective bargaining to the union, the burden of that expense is shifted to their fellow employees even though the benefits resulting from such bargaining continue to flow to all. Thus here, as in *Hardison,* the "accommodation" demanded by Burns can only be granted at the expense of other employees and, of necessity, constitutes preferential treatment on the basis of religion to the detriment of other employees.

There is no valid basis for distinguishing between the seniority provisions of the collective bargaining agreement in *Hardison* and the union security provisions of the collective bargaining agreement in the instant case. The union security agreement has the imprimatur of congressional approval under Section 2, *Eleventh* of the Railway Labor Act as do *bona fide* seniority systems under Section 703(h) of the Civil Rights Act of 1964. 45 U.S.C. § 152, *Eleventh;* 42 U.S.C. § 2000e-2(h). Just as this Court recognized in *Hardison* that collective bargaining agreements with their seniority provisions lie "at the core of our national labor policy", it recognized in *Railway Employees* v. *Hanson,* 351 U.S. 225 (1955), that the union security provisions of the Railway Labor Act play an integral role in the stabilization of labor relations and achievement of industrial peace in the railroad industry:

> "Industrial peace along the arteries of commerce is a legitimate objective; and Congress has great latitude in choosing the methods by which it is to be obtained. The choice by Congress of the union shop as a stabilizing force seems to us to be an allowable one . . . ." Id. at 233.

Concurring, Justice Frankfurter found that the union shop provisions of Section 2, *Eleventh* were an "exercise by Congress of its power under the commerce clause to promote peaceful industrial relations in the functioning of interstate railroads and thereby to further the national well-being." 351 U.S. at 238, 239.

To hold, as did the Court of Appeals that shifting the religious objectors' fair share of the substantial costs of collective bargaining to their fellow employees is a de minimis burden for employer and union is to ignore what this Court found to be a problem in the railroad industry of such significance that it required congressional action to achieve its solution. In *Machinists Union* v. *Street,* 367 U.S. 740 (1961), the Supreme Court determined that the problems engendered by "free riders" who received the benefits of the union's collective bargaining, but refused to pay their fair share of its cost, were the catalyst to passage of the union shop provisions of the Railway Labor Act.[1] The

[1] An employee does not avoid "free rider" status by contributing an amount equivalent to his union dues to a non-union charity. The Congress and the Court define a "free rider" as one who fails pay his fair share of the collective bargaining costs. This is borne out by the testimony of Southern Pacific Vice President Ball in this case. When asked if charitable contributions would answer the "free rider" problem, he replied:

> "Well, I don't think you would get at the point that is involved by paying the money to a religious or charitable organization other than a union. The principle the reason he is paying his dues is to support the activities that the union discharges under the Railway Labor Act in representing all of their members, all of the people in their crafts, without distinction and without discrimination . . . I think the employees would feel that he was not supporting the legitimate activities of the union which he was enjoying the same as they were for the payment of monies they were making. I think they would consider that his contribution to an organization other than the one that was negotiating for his benefit was something they couldn't tolerate." (TR 312, 313, 314.)

Presidential Emergency Board referred to in the *Street* opinion reported:

> "Individuals who do not share with their fellow employees the cost of the union's activities, the benefits of which they are perfectly willing to accept, present a problem in equities which is very real. They incur the displeasure and resentment of those who are members, and this may cause frictions and feuds which will lead to disunity in the normal causes of the employees, a result definitely not keeping with the purposes of the Railway Labor Act." *Report of Presidential Emergency Board No. 98,* App't'd. Exec. Order 10306, N.M.B. Case No. A3744 (1951).

In *Railway Employees'* v. *Hanson,* 351 U.S. 225 (1955), the Supreme Court recounted the following relevant legislative history leading to passage of Section 2, *Eleventh*:

> "The union shop provision of the Railway Labor Act was written into the law in 1951. Prior to that date the Railway Labor Act prohibited union shop agreements . . . While non-union members got the benefits of the collective bargaining of the unions, they bore 'no share of the cost of obtaining such benefits.' As Senator Hill, who managed the bill on the floor of the Senate, said, 'The question in this instance is whether those who enjoy the fruits and the benefits of the unions should make a fair contribution to the support of the unions.' Id. at 231."

To ignore the reality of the substantial adverse impact on industrial peace and efficiency which would re-

sult if the opinion of the Court of Appeals is allowed to stand is to reject the validity of Congressional purpose in enacting Section 2, *Eleventh* and the recognition of that purpose in the decisions of this Court in enforcing it. Both make crystal clear that the central reason for the union security provisions of the Railway Labor Act was to secure industrial peace and eliminate disruptions to interstate commerce. To contend that a problem which required action on the part of the Congress to achieve its solution will not impose an undue hardship on the industry by its resurrection is specious. This case comes to this Court with more than two decades of congressional and judicial experience in the railway union security field. That experience dictates even-handed distribution of the financial burden of collective bargaining without preference on the basis of religion to the detriment of others.

To pretend, as did the Court of Appeals, that the dues of only one employee involved is sophistry. The undisputed evidence in the District Court was that one per cent of the members of Burns' Local are Seventh Day Adventists, one of the churches espousing the doctrine ascribed to by Burns. The Church is world-wide in scope with more than one-half million members in the United States. Primarily based on the testimony of a high official of the Church, the District Court found that disproportionately high numbers of Seventh Day Adventists enter employment areas which provide union-free employment. If the union security agreements in the railroad industry were not enforced against them, this industry would provide an attractive employment opportunity for members of that faith because of its comparatively high wages and the formidable growth of unions in fields that in the past have

been union-free. Indeed, the majority of this Court in *Trans World Air Lines, Inc.* v. *Hardison,* 432 U.S. 63 (1977), rejected a similar "one individual-de minimis" argument stating that "it fails to take account of the likelihood that a company as large as TWA may have many employees whose religious observances, like Hardison's, prohibit them from working Saturdays or Sundays." Id. at 84, fn. 15. In addition to the evidence in this case, one need only look to some of the litigation engendered by religious objectors to union security agreements to realize we are not dealing with trifles.[2] See, e.g., *Anderson* v. *General Dynamics,* Case No. 77-2180 (9th Cir. 1978), Appendix p. 21a; *McDaniel* v. *Essex International,* 571 F.2d 338 (6th Cir. 1978); *Cooper* v. *General Dynamics,* 533 F.2d 163 (5th Cir. 1976), cert. denied, sub. nom.; *International Association of Machinists & Aerospace Workers* v. *Hopkins,* 433 U.S. 908, 53 L.Ed.2d 1091 (1977); *Yott* v. *North American Rockwell,* 501 F.2d 398 (9th Cir. 1974); *Hammond* v. *United Paper Workers,* 426 F.2d 174 (6th Cir. 1972); *Linscott* v. *Miller's Falls Co.,* 440 F.2d 14 (1st Cir. 1971), cert. denied, 404 U.S. 872 (1971); *Gray* v. *Gulf, M. & O. RR.,* 429 F.2d 1064 (5th Cir. 1970), cert. denied, 400 U.S. 1001 (1971); *Otten* v. *Baltimore & Ohio RR.,* 205 F.2d 58 (2nd Cir. 1956); *Wicks* v. *Southern Pacific Co.,* 231 F.2d 130 (9th Cir. 1956).

To shift a religious objector's fair share of the collective bargaining costs to his fellow employees and, at

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[2] "*De minimis* in the law has always been taken to mean trifles—matters of few dollars or less". *National Labor Relations Board* v. *Suburban Lumber Co.,* 121 F.2d 829, 832 (3rd Cir. 1941) cert. denied 314 U.S. 693 (1941). Burns' dues alone amounted to $19.00 per month or $228.00 per year. He has now worked for the railroad approximately 20 years and over that period of time would have paid union dues totaling over $2,500.00.

the same time, permit him to retain all the benefits that derive from that effort is to afford him preferential treatment on the basis of his religion and to thereby discriminate against those who will bear that burden. In *Trans World Air Lines, Inc.* v. *Hardison, supra,* this Court concluded its opinion stating:

> "As we have seen, the paramount concern of Congress in enacting Title VII was the elimination of discrimination in employment. In the absence of clear statutory language or legislative history to the contrary, we will not readily construe the statute to require an employer to discriminate against some employee in order to enable others to observe their sabbath. Id. at 85."

Certainly, there is nothing in the legislative history to intimate that the 1972 religion amendment to the Civil Rights Act [42 U.S.C. § 2000e(j)] would have the impact on union security agreements negotiated pursuant to Section 2, *Eleventh* of the Railway Labor Act which results from the decision of the Court of Appeals. 45 U.S.C. § 152, *Eleventh.* It is instructive to observe that at no point in the legislative consideration of this amendment is there any mention of accommodation of objection to union security agreements.[3] The entire

[3] Congress has repeatedly declined to enact exceptions to the union security provisions of the National Labor Relations Act. H. R. 11666, 89th Cong. 1st Sess. (1965), a bill to exempt persons with religious convictions from the union membership requirements of National Labor Relations Act died in Committee; S. 3203, 89th Cong., 2d Sess. (1966), a bill to protect persons conscientiously opposed to union membership was defeated; S. 3153, 89th Cong. 2d Sess. (1966), a bill making it unfair labor practice under National Labor Relations Act to require persons conscientiously opposed to union membership to join them was defeated; and S. 2108, a bill to make it an unfair labor practice for a labor organization to discriminate on account of race, color, religion or national origin died in Committee.

discussion centered on Saturday work. 118 *Congressional Record* pp. 705-731.

Even more significant, however, is the statement of Senator Randolph, the sponsor of the bill, now so often quoted and relied on by the Courts as a succinct expression of the Congressional intent. See, e.g., *Riley* v. *Bendix Corporation,* 464 F.2d 1113 (5th Cir. 1972); *Reid* v. *Memphis Publishing Company,* 468 F.2d 346 (6th Cir. 1972). In urging passage of the amendment, he said:

> "I think that in the Civil Rights Act we thus intended to protect the same rights in private employment as the Constitution protects in federal, state or local government." 118 *Congressional Record,* p. 705.

Randolph then stated that the amendment effectuated this intent. Thereafter, it was unanimously adopted by the Senate and the House.

It is clear that "the enactment of . . . [Section 2, *Eleventh*] . . . is the governmental action on which the Constitution operates though it takes a private agreement to invoke the federal sanction." *Railway Employees'* v. *Hanson,* 351 U.S. at 232. As the courts have recognized, in enacting the Religion Amendment, Congress intended to protect from interference in private employment only the same rights as the Constitution protects from interference by federal, state or local government. *Riley* v. *Bendix Corporation, supra; Reid* v. *Memphis Publishing Company, supra.* The Constitution does not protect religious objectors against governmental compulsion to comply with union security agreements negotiated pursuant to Section 2, *Eleventh* of the Railway Labor Act. *Machinists Union* v. *Street,* 367 U.S. 740 (1961); *Railway Employees'* v. *Hanson,*

351 U.S. 225 (1955); *Yott* v. *North American Rockwell*, 501 F.2d 398 (9th Cir. 1974); *Gray* v. *Gulf, M. & O. RR.*, 429 F.2d 1064 (5th Cir. 1970). cert. denied 400 U.S. 1001 (1971). Consequently, because the making of union shop agreements under Section 2, *Eleventh* is constitutionally permissible governmental action and because it was intended by Congress that the Civil Rights Act protect the individual from interference with his First Amendment rights by private employers *only* to the same degree and extent that those rights are protected under the Constitution from interference by federal, state and local governments, there can be no violation of the Civil Rights Act in situations where, as here, the rights of religious objectors are not protected from governmental impingement by the Constitution.

Additional evidence that an exception to the union security provisions of the Railway Labor Act is not to be implied from the passage of the religion amendments to the Civil Rights Act can be found in the language of the statute itself.[4] It begins: "Notwithstanding any other provision . . . of any other statute or law of the United States . . ." A carrier and union may make

[4] *Cf. Morton* v. *Mancari*, 417 U.S. 535 (1974). In *Mancari*, this Court held that the Equal Employment Opportunity Act of 1972 had not impliedly repealed provisions of The Indian Reorganization Act of 1934 according to employment preference to Indians for jobs in the Bureau of Indian Affairs. Preference for Indians in the BIA was found to be a part of a longstanding national policy on Indians, just as the agency shop provision is a longstanding part of national labor policy. As stated by the Court: "In light of the factors indicating no repeal, we simply cannot conclude that Congress consciously abandoned its policy of furthering Indian self-government when it passed the 1972 amendments." Id. at 551.

union shop agreements. 45 U.S.C. § 152, *Eleventh*. This preamble indicates the strong policy in seeing that all who receive the benefits of union representation must bear a proportionate share of the cost, and that exceptions to this policy shall not be found unless clearly or expressly provided.

Indeed, in 1974 when Congress extended the coverage of the National Labor Relations Act to employees of non-profit hospitals, an express provision amending § 8(a)(3) was adopted to exempt "any employee of a health care institution who is a member of and adheres to established and traditional tenets or teachings of a bona fide religion, body or sect which has historically held conscientious objection to joining or financially supporting labor organizations". 29 U.S.C. § 169 (1966 Supp.). Certainly, if the 1972 religion amendments to the Civil Rights Act already provided such an exemption, this legislation would have been totally unnecessary.

CONCLUSION

Contrary to the decision of the Court of Appeals, the decision of this Court in *Trans World Air Lines, Inc.* v. *Hardison*, 432 U.S. 63 (1977), is clear that Title VII does not require violation of the union security clause of a valid collective bargaining agreement to accommodate the religious preference of employees where such violation would shift the financial burden of collective bargaining to other employees. If the decision of the Court of Appeals is not contrary to *Hardison*, then the Court of Appeals has decided an important question of federal law which has not been, but should be, decided by this Court. For the reasons set forth

herein, this Petition for a Writ of Certiorari to the Court of Appeals for the Ninth Circuit is due to be granted.

Respectfully submitted,

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APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 76-1188

DUANE TERRELL BURNS, *Plaintiff-Appellant,*

v.

SOUTHERN PACIFIC TRANSPORTATION Co., et al.,
Defendants-Appellees.

Filed September 7, 1978

Appeal from the United States District Court
for the District of Arizona

Before: HUFSTEDLER and GOODWIN, Circuit Judges, and LUCAS,* District Judge

OPINION

HUFSTEDLER, Circuit Judge:

Burns brought this Title VII action seeking to enjoin his employer, Southern Pacific Transportation Company ("Company") and the United Transportation Union and its local ("Union") from discharging him for his refusal to pay union dues and assessments in violation of his sincerely-held religious beliefs. The district court held that the Union and the Company had fulfilled their statutory duties of accommodation required by the Civil Rights Act of 1964, as amended (42 U.S.C. §§ 2000e *et seq.*, particularly § 2000e(j) (1970 Supp. 2)) when they offered to relieve Burns of his obligation to belong to the Union and that no further accommodation was required because payment of the dues-equivalent to a charity worked an undue hard-

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* Honorable Malcolm M. Lucas, United States District Judge, Central District of California, sitting by designation.

ship upon the Union and its members by relieving Burns of paying his fair share of union expenses. The district court also rejected Burns' attack upon the constitutionality of the application to him of § 2, *Eleventh* of the Railway Labor Act (45 U.S.C. § 152, *Eleventh* (1970)). We reverse in part, holding that the Company and the Union failed to carry their burden of proving good faith efforts reasonably to accommodate Burns' religious beliefs and their further burden of proving that no accommodation reasonably could be made without undue hardship to the Union or the Company. We affirm the district court's rejection of Burns' constitutional claim.

Burns has been employed by the Company since 1955; he is classified as a brakeman and conductor. For many years he has also been a member of the Seventh Day Adventist Church. He withdrew from the Union on February 26, 1974, when he became aware that his affiliation with the Union and his payment of dues to the Union were in direct conflict with the teachings of his Church. The district court found on ample evidence that Burns has a sincere religious belief in the teachings of his Church forbidding membership in labor organizations and contributions to such organizations. He requested an informal accommodation to his religious beliefs and asked to meet personally with representatives of the Union and the Company. He has offered to pay the equivalent of union dues and assessments to a designated charity and to offer proof to the Union of such charity payments. The Union and the Company were willing to waive any requirement of membership in the Union and participation in union activites, but both declined to consider any accommodation which would involve Burns' not paying union dues and assessments.

Upon refusal by the Union and the Company to consider any accommodation in respect of dues and in anticipation of his discharge, Burns filed charges of religious discrimi-

nation with the Equal Employment Opportunity Commission in Arizona. Thereafter, he obtained a right-to-sue letter, and he filed this complaint in the district court on March 1, 1974. The original complaint sought injunctive relief, attorney's fees, and damages. After the Company and the Union agreed that Burns could continue to work while the litigation was pending, the complaint was amended to seek only injunctive relief from discharge and attorney's fees. The case was tried by the court without a jury, resulting in judgment against him, and Burns appeals.

At all material times the Company and the Union have had in effect a Union security agreement requiring all employees, as a condition of employment, to be members in good standing of the Union. A companion agreement between the predecessor of the Union and the Company contained a provision which gives some relief to religious objectors by stating that an employee having religious scruples against joining a union "will . . . be deemed to have met the requirements of the Union Shop Agreement if he agrees to and does pay initiation fees, periodic dues and assessments of the organization representing his craft or class signatory hereto."

Burns fully met his burden of proving a *prima facie* case of religious discrimination in violation of Title VII. He proved that he had a bona fide belief that union membership and the payment of union dues were contrary to the teachings of his Church. He informed his employer and the Union about his religious views. He was thereafter threatened with discharge for his refusal to pay union dues and assessments. (*Anderson v. General Dynamics Convair Aerospace Division* (9th Cir. 1978) —— F.2d ——.) Thereafter the burden was on the Company and the Union to prove that they made good faith efforts to accommodate Burns' religious beliefs, that the efforts were unsuccessful, and that they were unable reasonably to accommodate those beliefs without undue hardship. (42 U.S.C. § 2000e(j);

Anderson v. General Dynamics Convair Aerospace Division, supra.)

We begin our analysis with *Trans World Airlines v. Hardison* (1977) 432 U.S. 63. The Court noted there that Congress did not define the degree of accommodation which is required of an employer under section 701(j) of the Civil Rights Act (432 U.S. at 73-76), but that the legislative history is at least clear that "Congress intended to require some form of accommodation" and to change prior case law which had condoned an employer who "had not made any effort whatsoever to accommodate the employee's religious needs." (*Id.* at 74, n.9.) Thus, the employer is required to take some steps in negotiating with the employee to reach a reasonable accommodation to the particular religious beliefs at issue. (*Anderson v. General Dynamics Convair Aerospace Division, supra,* —— F.2d at ——; *McDaniel v. Essex International, Inc.* (6th Cir. 1978) 571 F.2d 338, 341-42.)

Once the employer has made more than a negligible effort to accommodate the employee (*Trans World Airlines v. Hardison, supra,* 432 U.S. at 77) and that effort is viewed by the worker as inadequate, the question becomes whether the further accommodation requested would constitute "undue hardship." Once again, this term is not defined by the Civil Rights Act, but the burden of proving undue hardship rests upon the employer or union. The *Hardison* Court found that the employer had demonstrated undue hardship where the accommodation requested by the employee (a four-day work week) would have effectively required preferential treatment on the basis of religion for Sabbatarians, causing sacrifices or dislocation in the work schedules of fellow-workers or requiring the employer to hire outsiders to work Saturday shifts at "premium wages." (*Id.* at 81-84.) The Court held that where the impacts upon co-workers or costs are greater than *de minimis,* undue hardship is demonstrated. (*Id.* at 84.) We now apply the *Hardison* principles to the facts herein.

The Company and the Union made no effort to accommodate Burns' particular religious beliefs. In effect, they informed Burns that his only alternative was to accept the terms of the existing contract which freed him from the obligation of membership if he paid dues to the Union. Burns' religious beliefs, however, forbade payment of dues to the Union. Neither the Company nor the Union attempted to accommodate this belief. Their position therefore is that no accommodation is possible when an employee refuses to pay the union dues and assessments because non-payment of such sums places an undue hardship on the Union as a matter of law or under proof offered in the case.

We rejected the contention that the substitution of payments to a charity for payment of union dues was an undue hardship as a matter of law in the companion case, *Anderson v. General Dynamics Convair Aerospace Division, supra.*[1] (*Accord McDaniel v. Essex International, Inc., supra,* 571 F.2d 338.) We therefore turn to the examination of the record to decide whether the Union and the Company proved as a matter of fact that substituted payments would create an undue hardship to the Union and the Company.

Appellees' hardship case was based in part upon opinions that "free rider" problems could cause serious dissention among employees, resulting in inefficiency of operation. These witnesses, however, did not attempt to relate a general sentiment against free riders either to Burns or to a person who, like Burns, made payments equivalent to union dues to a charitable organization. The Union and

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[1] No difference in result can be based upon the fact that the Union security agreement considered in *Anderson* responded to § 8(a)(3), (b)(2) of the Taft-Hartley Act, 29 U.S.C. § 158(a)(3), (b)(2) (1970) and that the Union security provisions of this case were authorized under the similar provisions of Section 2, *Eleventh* of the Railway Labor Act, 45 U.S.C. § 152. (McDaniel v. Essex Internat'l, Inc. (6th Cir. 1978) 571 F.2d 338.)

the Company also argued that, based on unofficial and unscientific polls, employee dissatisfaction with persons who were free riders or who received different treatment of any kind was not hypothetical. We are not persuaded. We agree with the Sixth Circuit, speaking in *Draper v. U.S. Pipe & Foundry Co.* (6th Cir. 1976) 527 F.2d 515, 520:

> "We are somewhat skeptical of hypothetical hardships that an employer thinks might be caused by an accommodation that has never been put into practice. The employer is on stronger ground when he has attempted various methods of accommodation and can point to hardships that actually resulted."

As we noted in *Anderson v. General Dynamics Convair Aerospace Division, supra,* undue hardship requires more than proof of some fellow-worker's grumbling or unhappiness with a particular accommodation to a religious belief. (—— F.2d at ——.) An employer or union would have to show, as in *Hardison,* actual imposition on co-workers or disruption of the work routine.

The Union also contends that it would suffer substantial financial hardship if Burns were permitted to pay the equivalent of union dues and assessments to a charitable fund because the costs of collective bargaining would be disproportionately borne by union members and because the administrative costs in keeping track of Burns' charitable contributions would be more than *de minimis.* Excusing Burns from paying his dues to the Union would deprive the Union of $19 per month. The allocation of dues payments was: $7 to the Local, distributed half for salaries and expenses and the other half to the Local's Committee of Adjustment; $5 to the International Union; $4 to the Union's General Committee of Adjustment; and $3 to the State Legislative Board. There was testimony from one of the Union officers that the loss of Burns' $19 per month

dues "wouldn't affect us at all." In our view, the loss of dues to the Union is *de minimis,* even if so necessary to its fiscal well-being that its equivalent would be collected from the Local's 300 members at a rate of 2 cents each per month. The district court did not decide to the contrary as in *Hardison.* (*See* 432 U.S. at 84, n.15.) Rather, the district court accepted the Union's contention that accommodating Burns would open the gate to excusing vast numbers of persons who claimed to share Burn's beliefs, hence resulting in a greater than *de minimis* burden on the Union and Union members. The record does not support this speculation. The evidence was that only three persons subject to the Local's jurisdiction were Seventh Day Adventists.[2] If, in the future, the expressed fear of widespread refusal to pay union dues on religious grounds should become a reality, undue hardship could be proved.[3] But on the present record, no substance was given to these apprehensions. (*See McDaniel v. Essex International, Inc., supra,* 571 F.2d at 343-44.)

We quickly dismiss the contention that administrative difficulties in accommodating Burns' religious beliefs would

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[2] The concern that quantities of religious objectors would deplete the financial resources of the Union is not shared by George Meany, President of the AFL-CIO. A letter from George Meany was introduced into evidence in which Mr. Meany expressed his opinion that religious views such as those of Burns should be accommodated to respect individual religious reservations in the administration of union security agreements and suggesting that an appropriate method for accommodation would be the payment of the equivalent of dues to a union charitable fund or to an agreed-upon charity.

[3] *See* Trans World Airlines v. Hardison, *supra,* 432 U.S. at 31 (it would be anamolous to conclude that reasonable accommodation requires actions depriving other employees of their rights); *see also id.* at 90 (Marshall, J., dissenting) ("important constitutional questions would be posed by interpreting the law to compel employers (or fellow-employees) to incur substantial costs to aid the religious observor.").

cause undue hardship. No evidence was presented on this point, other than testimony that keeping track of Burns' charitable contributions would entail some bookkeeping. No one testified concerning the cost of the minor modifications which would be thereby required, and we cannot say that the modest amount of paper work would impose even *de minimis* cost.

The district court correctly rejected Burns' constitutional challenge to section 2, *Eleventh* of the Railway Labor Act. As Burns necessarily concedes, the constitutional issue has been repeatedly resolved against him. (*E.g., Yott v. North American Rockwell Corp.* (9th Cir. 1974) 501 F.2d 398, 403-04.)

For the first time on appeal, the Company has challenged the constitutionality of § 701(j) of the Civil Rights Act, as amended, on the ground that it violates the establishment clause of the First Amendment. We decline to reach the constitutional question under these circumstances. If the Company is so inclined, it can raise the constitutional question in the district court following remand.

Burns is entitled to a reasonable attorney's fee as a part of his costs, pursuant to 42 U.S.C. § 2000e-5(k), the amount of which shall be fixed by the district court on remand.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with the views herein expressed.

Filed
September 7, 1978

Emil E. Melfi
Clerk, U.S. Court of Appeals

OFFICE OF THE CLERK
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NOTICE OF ENTRY OF JUDGMENT

Please take notice that the judgment was filed and entered in the case noted on the attached disposition (opinion, memorandum or order). Also, please take special notice of the date of filing as it represents the date of entry judgment.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

No. Civ. 74-35 Tuc. (JAW)

DUANE TERRELL BURNS, *Plaintiff*,

vs.

SOUTHERN PACIFIC TRANSPORTATION COMPANY, UNITED TRANSPORTATION UNION, AND UNITED TRANSPORTATION UNION LOCAL NO. 807, *Defendants*.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause having been heretofore tried to the court, sitting without a jury, and the court having heard and considered the evidence and considered the stipulations of the parties, the court now finds the facts and states separately its conclusions of law as follows:

Findings of Fact

1. Plaintiff, Duane Terrell Burns, a railroad trainman and a resident of Tucson, Arizona, has been employed by defendant Southern Pacific Transportation Company (hereinafter "Southern Pacific") in the capacities of brakeman or conductor since 1955. (R.T. 131).

2. Defendant United Transportation Union (hereinafter "UTU") is a labor organization national in scope which is certified to represent for collective bargaining purposes on Southern Pacific, the crafts of brakemen and conductors in which plaintiff is employed. (Pretrial Order, p. 2).

3. Defendant Southern Pacific is a common carrier by railroad engaged in the transportation of freight in interstate commerce. (R.T. 285, 299).

4. Defendant United Transportation Union, Local 807 (hereinafter "Local 807") is responsible for supervising the application and administration in the operations of

Southern Pacific, in and extending from Tucson, of collective bargaining agreements negotiated by the parent organization, UTU, through its respective general committees. (R.T. 257).

5. Plaintiff is a "person" within the meaning of 42 U.S.C., § 2000e(a) and is an employee of Southern Pacific, an "employer" within the meaning of 42 U.S.C., § 2000e (b). UTU and Local 807 are "labor organizations" within the meaning of 42 U.S.C., § 2000e(d). Plaintiff is subject to membership in UTU and Local 807 by virtue of 45 U.S.C., §§ 151, et seq.

6. Prior to plaintiff's employment with Southern Pacific, the predecessor of UTU and Southern Pacific negotiated a Union Security Agreement which provides in pertinent part, as follows:

> "All employees . . . shall, as a condition of continued employment . . . within sixty days following the establishment of . . . seniority . . . become members of and thereafter maintain membership in good standing in, the organization* . . .". (Joint Exhibits 1 and 5).

7. A companion agreement between the predecessor of UTU and Southern Pacific, executed contemporaneously with the agreement quoted in Paragraph 6, supra, provided the following accommodation to religious objectors:

> "In the application of the Union Shop Agreement . . . any employee *in service on the date of this agreement* who is not a member of the union representing his craft or class . . . and [who] will make affidavit [that] he was a member of a bona fide religious group, on the date of this agreement, having scruples against joining a union will . . . be deemed to have met the requirements of the Union Shop Agreement if he

* Now UTU.

agrees to and does pay initiation fees, periodic dues and assessments of the organization* representing his craft or class signatory hereto." (Joint Exhibits 3 and 6. Emphasis added).

8. Plaintiff, on being employed by Southern Pacific, became an active member of the predecessor of UTU and its Local 807 and subsequently was elected to the office of Local Chairman. (R.T. pp. 135, 136).

9. On November 21, 1970, plaintiff joined the Seventh-day Adventist Church and on February 26, 1974, resigned his membership in UTU and in Local 807 and refused to again tender to the Union periodic dues and assessments as required by the Union Security Agreement. (R.T. 135, 136; PX 17 in Evidence).

10. Plaintiff's reason for his severance of all connections with the Union lies in his religious convictions against membership in unions and financial support thereof. (R.T. 138, 144). He contends that the Union Security Agreement violates his rights under the First, Fifth, Ninth and Fourteenth Amendments to the Constitution of the United States and constitutes religious discrimination in violation of the Civil Rights Act of 1964, as amended in 1972. 42 U.S.C., §§ 2000e(j) and 2000e-2(a)(1). (Plaintiff's Complaint).

11. Plaintiff filed charges of religious discrimination with the Equal Employment Opportunity Commission, at Phoenix, Arizona, on November 21, 1973, in compliance with Section 706(e) of the Equal Employment Opportunity Act of 1972. No conciliation having been effectuated and upon plaintiff's request, the Commission issued to plaintiff on January 25, 1974, its Notice of Right to Sue with respect to defendant Southern Pacific and defendant Local 807; and on February 20, 1974, the Commission issued its Notice of Right to Sue with respect to defendant UTU. Plaintiff filed this action on March 1, 1974. (Pretrial Order, p. 3).

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* Now UTU.

12. It is a basic tenet held and taught by the Seventh-day Adventist Church for many years that it is a violation of God's teaching for its members who have matured in their beliefs to either join or support a labor organization. Plaintiff sincerely holds the belief that he should not be a member or financially support a labor organization; and plaintiff sincerely holds the belief, further, that his payment of monies to UTU would be a violation of his religious convictions and would jeopardize his eternal salvation. (Plaintiff's Brief, File Document 39, pp. 4 through 10).

13. Both UTU and Southern Pacific have agreed to accommodate plaintiff's religious beliefs by waving any requirement of the Union Security Agreement that plaintiff be or remain a member of the Union or participate in any Union activity, if he will pay to the Union, through the medium of periodic dues and assessment, his fair share of the costs of collective bargaining. (R.T. 164, 165).

14. The collective bargaining efforts of UTU have resulted in substantial employment benefits to the plaintiff in the form of high wages, job protection, security and promotional opportunity, health care, safer working conditions, retirement pay, and other incidental employment benefits, all of which are available to every employee in crafts represented by UTU, regardless of race, religion, national origin or sex. (R.T., pp. 153-156, 218-229).

15. UTU, in addition to its responsibility under the Railway Labor Act for the negotiation of collective bargaining agreements, also has the duty to administer and enforce those agreements on a virtually continuous basis. (R.T. pp. 212-217, 230-237). In fullfillment of this function, elected officials of UTU and its locals represent employees who are disciplined or discharged in administrative hearings on the various railroad properties, before the National Railroad Adjustment Board and before various Public Law Boards created pursuant to the Railway Labor Act. (R.T. pp. 225, 230-233).

16. The representative efforts of UTU within the framework of the Railway Labor Act and its processes contribute substantially to the fulfillment of the primary objective of that legislation, i.e., to promote industrial peace and to secure the uninterrupted flow of interstate commerce. (R.T. pp. 213-217).

17. The representative efforts of UTU to achieve the aforementioned purposes of the Ralway Labor Act and to secure to the members of its represented crafts the substantial benefits which they now enjoy in wages, working conditions, job security, and health and retirement benefits requires the expenditure of large sums of money to pay the salaries and expenses of and to train, support and maintain the necessary complement of full and part-time union representatives and their supporting staffs. It is further necessary for the union to purchase or rent and maintain some office buildings, many offices, and much office equipment and supplies. (R.T. pp. 230-236, 239-241).

18. In order to obtain the necessary funds to fulfill its legislative purposes under the Railway Labor Act and to fully and fairly represent all employees which it is certified to represent, it is necessary to assess and collect from these employees an amount equal to their fair share of the collective bargaining expense. These assessments are made in the form of and are called periodic union dues and assessments. (R.T. pp. 241, 242).

19. The Seventh-day Adventist Church is worldwide in its scope, with approximately one-half million members in the United States. (A.T. p. 28). In Local 807, one percent of the members belong to the Seventh-day Adventist Church. (R.T. pp. 258, 276).

20. Witness Melvin Adams, a high official in and an ordained minister of the Seventh-day Adventist Church, testified as an expert in behalf of the plaintiff. His testimony established that disproportionately high numbers of

Seventh-day Adventists enter employment areas which provide union-free employment and that if union security agreements in the railroad industry were not enforced against Seventh-day Adventists, this industry would provide an attractive employment opportunity for the members of that faith, particularly in view of the formidable growth of unions in fields that have in the past been union-free. (R.T. pp. 66,69).

21. If plaintiff's contentions herein are sustained, it is very likely that addition Seventh-day Adventists and other employees in the railroad industry with similar beliefs [1] would, on the basis of the decision herein refuse to pay dues or assessments to the Union. Further, it is very likely that many other persons holding such beliefs would seek and obtain employment in the railroad industry because of the relatively high wages and other benefits enjoyed by railroad employees. These developments would result in substantial financial hardship to defendant UTU.

22. Plaintiff testified (R.T. pp. 150-152) that he stood ready, so long as he remained an employee of Southern Pacific, to pay monies equal to UTU dues and assessments (and in lieu of payment thereof), to a designated charity (non-religious and non-union affiliated); and to furnish to UTU proof of each and every payment so made.[2] However,

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[1] See: *Wicks v. Southern Pacific Company*, 231 F.2d 130, at p. 132, f.n. 2.

[2] Burns testified, also that to implement this offer he had established a Trust (PX 18 in evidence) and paid into it an amount equal to the amount of union dues and asessments he would have paid had he remained a member of UTU. However, examination of the Trust Agreement discloses that the Trustee is plaintiff's church; the Agreement requires (a) that the cash held in the Trust be invested to earn at least 5% per annum, (b) that the specified (5%) rate be paid to Burns annually, (c) that all earnings from the cash in excess of 5% shall be retained by the Trustee, (d) that in certain circumstances both principal and income of

if the accommodation suggested by plaintiff were to be really operable in cases of employees having a conscientious objection to joining or financially supporting labor organizations, in order to keep peace and harmony between union members and Southern Pacific undoubtedly more would be required than proof of payment of the charitable contributions. For example, in order that Southern Pacific, or UTU, for that matter, would be able to assure employees paying union dues and assessments that employees in Burns' situation were not "free riding", more would be required than having the receipts for charitable donations produced and examined. Investigation and checking would be required in order to determine for each employee in Burns' situation the amount of his charitable contributions in the years immediately prior to his discontinuing payment of union dues and assessments. In addition, Southern Pacific and UTU would have to do the investigation and checking necessary to be certain that the annual charitable contributions of each employee in Burns' situation, after discontinuing payment of union dues and assessments, equaled the total of his annual charitable contributions and union dues and assessments before discontinuing payment of such dues and assessments. This burden, and likely others not presently apparent, would be cast upon Southern Pacific or UTU, or both, would require considerable time, effort and expense, and would impose undue hardship on Southern Pacific and UTU.

23. The employee hostility, dissension, friction, and consequent loss of operating efficiency and safety which would result if plaintiff were to receive the benefits of collective bargaining without paying his fair share of its costs would undoubtedly result in undue hardship on Southern Pacific.

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the Trust may be used for support of plaintiff, and (e) that in the event of plaintiff's death the assets remaining in the Trust are to pass to plaintiff's designated heirs. In light of the terms and provisions of the Trust, it is evident that there is no certainty that any monies now in the Trust will ever pass to a non-religious charity.

(R.T. 289-291). The operation of railroad trains, involving as it does assembling, switching, and moving at high speeds large consists of railroad cars requires a team effort if it is to be efficient and safe. (R.T. 264-266). The testimony of both management and union witnesses, based on experience, established that the hostility generated by the "no bill" or 'free riders" has a substantially adverse impact on such safety and efficiency. Witness Carl Ball, Vice-President of Operations for Southern Pacific, testified from an experience of thirty-nine years in the field that, in his opinion, the failure to require plaintiff to pay his fair share of the collective bargaining costs would cause significant employee hostility, dissension, and lack of communication, resulting in undue hardship to Southern Pacific in the form of reduced operational efficiency and safety. (R.T. pp. 287, 200-292, 311-315). Mr. Balls' opinion appears quite sound when consideration is given to the fact that Burns fellow workers could very well be expected to have difficulty in accepting Burns' sincerity in being unable in conscience to pay union dues and assessments while he was able to accept the benefits he shares with his fellow workmen, made possible by their payment of union dues and assessments.

24. UTU Vice-President George Legge testified, based on more than thirty years experience in the railroad industry, that free-rider problems were serious enough on occasions to cause brother to be pitted against brother and father against son. He testified that employee reactions included refusal of union members to speak to non-union members, union members bidding off assignment to avoid working with non-members, and other conduct resulting in inefficiency of operations. (R.T. pp. 244, 245). Chairman Dan Johnson of Local 807 testified that employee reaction to plaintiff's failure to pay union dues and assessments [3] was

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[3] The employees consulted by Johnson were advised that Burns would pay to a charity of UTU's choice an amount equal to union dues and assessments.

belligerance, hostility, threats of refusal to work with plaintiff, and threats of refusal to pay dues to the Union if Burns is not required to do so. (R.T. pp. 264-266, 273, 274, 277-281).

Conclusions of Law

1. This Court has jurisdiction of this action and of parties thereto.

2. The requirement that plaintiff tender periodic union dues and assessments as required by the Union Security Agreement negotiated by the defendants United Transportation Union and Southern Pacific Transportation Company pursuant to the Congressional authorization in Section 2, *Eleventh* of the Railway Labor Act does not violate plaintiff's rights under the *First, Fifth, Ninth,* or *Fourteenth* Amendments to the Constitution of the United States. *Railway Employees v. Hanson,* 351 U.S. 225 (1955); *Machinists Union v. Street,* 367 U.S. 740 (1961); *Yott v. North American Rockwell,* 501 F.2d 398 (9 Cir. 1974); 45 U.S.C. § 152, *Eleventh.*

3. Neither the Civil Rights Act of 1964 nor the 1972 amendments thereto operated to repeal, in whole or in part, or to modify Section 2, *Eleventh* of the Railway Labor Act authorizing the Union Security Agreement in question. *Yott v. North American Rockwell,* 501 F.2d 398 (9 Cir. 1974).

4. In enacting the Railway Labor Act, Congress was motivated by these legislative findings: Collective bargaining is more costly to a railroad from a monetary standpoint than such bargaining when conducted in any other industry. The administrative machinery involved is more complete and more complex. The mediation, arbitration, and Presidential Emergency Board provisions of the Railway Labor Act, while greatly in the public interest, are very costly to the Union. The handling of disputes through the National Railroad Adjustment Board also requires expenses which

are not experienced by unions in other industries. *Machinists Union v. Street,* 367 U.S. 740, 761-762.

5. Congress enacted Section 2, *Eleventh* of the Railway Labor Act in response to the problems and unrest created by the employee who received the benefits of collective bargaining while failing to pay his fair share of the cost thereof. *Machinists Union v. Street,* 367 U.S. 740, 763 (1961).

6. The Union Shop provisions of the Railway Labor Act represent an exercise by Congress of its power under the commerce clause to promote peaceful industrial relations in the functioning of interstate railroads and thereby further the national well-being. *Railway Employees' v. Hanson,* 351 U.S. 225 (1955).

7. Defendants UTU and Southern Pacific have offered a reasonable accommodation to plaintiff's religious beliefs by agreeing to waive any requirement that he remain a member of the Union or participate in any union activities so long as he continues to tender periodic dues and assessments as required by the Union Security Agreement. *Cooper v. General Dynamics,* 378 F. Supp. 1258, 1262.

8. The granting to plaintiff of the relief he requests in this action would, in light of Findings 21, 22, 23, and 24, supra, constitute "undue hardship" on Southern Pacific and UTU.

9. Defendants are entitled to judgment herein that plaintiff take nothing by his complaint, that this action be dismissed, and that defendants have their costs herein.

Dated: January 8, 1976.

James A. Walsh

United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

No. Civ. 74-35 Tuc. (JAW)

JUDGMENT
DUANE TERRELL BURNS, *Plaintiff,*

vs.

SOUTHERN PACIFIC TRANSPORTATION COMPANY, UNITED TRANSPORTATION UNION, and UNITED TRANSPORTATION UNION LOCAL NO. 807. *Defendants.*

Filed January 8, 1978

This cause having been heretofore tried to the court, sitting without a jury, and the court having filed herein its Findings of Fact and Conclusions of Law,

IT IS ORDERED AND ADJUDGED that plaintiff take nothing by his complaint herein, that the action be dismissed on the merits, and that defendants have and recover of plaintiff their costs of suit.

DATED: January 8, 1976.

/s/ James A. Walsh

United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE NINTH DISTRICT

No. 77-2180

DAVID ANDERSON, *Plaintiff-Appellant,*

v.

GENERAL DYNAMICS CONVAIR AEROSPACE DIVISION, a corporation, and INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO, SILVERGATE DISTRICT LODGE 50, *an association, Defendants-Appellees.*

Appeal from the United States District Court
for the Southern District of California

Before: HUFSTEDLER and GOODWIN, Circuit Judges, and LUCAS,* District Judge

OPINION

HUFSTEDLER, Circuit Judge:

Anderson, a former employee of General Dynamics Convair Aerospace Division ("General Dynamics") brought this Title VII action against General Dynamics and the International Association of Machinists and Aerospace Workers, AFL-CIO, Silvergate District Lodge 50 ("Union"), claiming that he had been discharged in violation of the religious discrimination provisions of Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e-2(a) and 42 U.S.C. § 2000e(j)). He sought reinstatement of employment and benefits, an injunction restraining the Union from discriminating against him, back pay and allowances, allowances, reasonable attorney's fees, costs and interest. The district court held that no accommodation to Anderson's religious beliefs was possible because his offer to con-

* Honorable Malcolm M. Lucas, United States District Judge, Central District of California, sitting by designation.

tribute the amount of Union dues to a charity of his choice, rather than to the Union or charities of the Union's choice, imposed an undue hardship on the Union. (*Anderson* v. *General Dynamics Convair Aerospace Division* (C.D. Cal. 1977) 430 F. Supp. 418.)

The critical issue on appeal is whether the Union carried its burden of proving that it could not reasonably accommodate Anderson's religious convictions without undue hardship on the Union. We conclude that it did not carry its burden of proof.

Anderson was first employed by General Dynamics on October 11, 1956. In 1959, he became a member of the Seventh Day Adventist Church. A tenet of the Church is that its members should not belong to or contribute to labor organizations. Anderson has at all material times held a sincere belief in that tenet. From 1959 until April 3, 1972, the collective bargaining agreement between General Dynamics and the Union did not require General Dynamics to employ only / / persons who were union members. On April 3, 1972, however, the Union and General Dynamics entered into a collective bargaining agreement, which contained the following provision:

> "Any employee on the Company's active payroll who is in the bargaining unit and is not a member of the Union on 3 April, 1972, shall, as a condition of continued employment in the bargaining unit, join the Union within ten (10) days after the thirtieth (30th) day following the effective date of this agreement, and shall maintain his membership as provided in Paragraph A above."

Anderson did not join the Union within the time limitation provided by the security clause of the bargaining agreement. On May 25, 1972, the Union notified Anderson of his delinquency under the agreement. On June 12, 1972, Anderson informed General Dynamics, which, in turn, informed the Union, that his religious beliefs prohibited him from joining the Union. Two days later, the Union requested that Anderson be discharged for failure to abide by the provisions of the security clause. On June 16, 1972, General Dynamics discharged Anderson from his employment for the sole reason that he refused to become a member of or contribute to the Union.

The parties stipulated that neither the Union nor General Dynamics offered Anderson any specific alternatives or accommodations with respect to joining the Union, and both the Union and General Dynamics told Anderson that he had to follow the collective bargaining and join the Union. The parties also stipulated that Anderson had made known to his fellow workers, including his shop committeemen, that he would not join the Union and that he would not contribute to the Union, unless he could insure that his contributions went to a recognized charity.

Anderson promptly filed a complaint with the Equal Employment Opportunity Commission, which deferred the matter to the California Fair Employment Practice Commission ("FEPC"). The FEPC referred the case back to the EEOC. After finding reasonable cause to believe that Anderson's discrimination charge was well-founded, the EEOC attempted conciliation. When conciliation failed, EEOC issued a right to sue letter on October 5, 1975. Anderson timely filed a complaint in the district court. The district court rendered judgment against him, and he appeals.

Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a) provides in pertinent part as follows:

> "It shall be an unlawful employment practice for an employer (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of

such individual's race, color, religion, sex or national origin. . . . ."

Similar conduct by a labor organization is also proscribed by the Act. (42 U.S.C. § 2000e-2(c).)[1]

In 1972, Congress enacted 42 U.S.C. § 2000e(j), incorporating the substance of the 1967 EEOC guidelines (29 C.F.R. § 1605.1). The section provides:

> "The term 'religion' includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business."

As the Supreme Court has explained, in *Trans World Airlines, Inc. v. Hardison* (1977) 432 U.S. 63, 74: "The intent and effect of this definition was to make it an unlawful employment practice under § 703(a)(1) for an employer [and also for a union] not to make reasonable accommodations, short of undue hardship, for the religious practices of his employees and prospective employees."

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[1] Section 2000e-2(c) provides as follows:

"It shall be an unlawful employment practice for a labor organization——

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;

(2) to limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section."

Neither Congress nor the EEOC has attempted to spell out any precise guidelines for determining when the "reasonable accommodations" requirement has been met, nor the kinds of circumstances under which a particular accommodation may cause hardship that is "undue." These decisions must be made in the particular factual context of each case because the decision ultimately turns on the reasonableness of the conduct of the parties under the circumstances of each case. (*Redmond v. GAF Corp.* (7th Cir. 1978) 574 F.2d 897, 902-03; *Williams v. Southern Union Gas Co.* (10th Cir. 1976) 529 F.2d 483, 489. *Cf. Trans World Airlines, Inc. v. Hardison, supra,* 432 U.S. at 74-75.)

We, as well as other courts, have recognized that there is both tension and conflict between the legitimate interests of the Union in preserving the benefits of union security agreements, which are valid under the National Labor Relations Act (29 U.S.C. § 158), and the accommodation requirements of Title VII (*e.g., Yott v. North American Rockwell Corporation* (9th Cir. 1974) 501 F.2d 398; *McDaniel v. Essex Intern'l, Inc.* (6th Cir. 1978) 571 F.2d 338; *Cooper v. General Dynamics, Convair Aerospace Division* (5th Cir. 1976) 533 F.2d 163, 166-69). The balance has been struck, however, in favor of the elimination of discrimination in employment practices and requiring accommodation of religious practices absent proof by the Union, the employer, or both, that reasonable accommodation cannot be made without an undue hardship to the Union or to the employer. (*Trans World Airlines, Inc. v. Hardison, supra,* 432 U.S. 63; *McDonald v. Santa Fe Trail Transportation Co.* (1976) 427 U.S. 273; *Franks v. Bowman Transportation Co.* (1976) 424 U.S. 747.)

To establish a prima facie case of discrimination under §§ 2000e-2(a)(1) and (j) Anderson had the burden of pleading and proving that (1) he had a bona fide belief that union membership and the payment of union dues are

contrary to his religious faith;[2] (2) he informed his employer and the Union about his religious views that were in conflict with the Union security agreement; and (3) he was discharged for his refusal to join the Union and to pay union dues. (*E.g., Yott v. North American Rockwell Corp., supra,* 501 F.2d 398; *Redmond v. GAF Corp., supra,* 574 F.2d at 901.)[3] Both by stipulations of fact and by evidence introduced at trial, Anderson established his prima facie case.

The burden was thereafter upon General Dynamics and the Union to prove that they made good faith efforts to accommodate Anderson's religious beliefs and, if those efforts were unsuccessful, to demonstrate that they were unable reasonably to accommodate his beliefs without undue hardship. *Id.* at 902.

Neither the Union nor General Dynamics did anything to accommodate Anderson's religious beliefs. They contend that their failure to take any steps to accommodate is ex-

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[2] We have no occasion in this case to determine the breadth of the "beliefs" or "practices" protected by section 2000e(j) or to grapple with bona fides of a particular employee's religious convictions. Both of these facts are conceded for the purpose of this case. We are aware, however, of the Supreme Court's admonition in Fowler v. Rhode Island (1953) 345 U.S. 67, 70 that "it is no business of courts to say . . . what is a religious practice or activity . . . ." *See also* Redmond v. GAP Corp., *supra,* 574 F.2d at 900.

[3] We agree with the Seventh Circuit that the employee who has provided his employer with sufficient information to put it on notice of his religious needs is not required, as part of his prima facie case, to show that he thereafter made some efforts either to compromise or accommodate his own religious beliefs before he can seek an accommodation from his employer. (Redmond v. GAF Corp., *supra,* 574 F.2d at 901-02 ("While we feel plaintiff should be free, even encouraged, to suggest to his employer possible ways of accommodating his religious needs, we see nothing in the statute to support the position that this is part of plaintiff's burden of proof." *Id.* at 901.)

cused because Anderson insisted on making an equivalent payment to a charity of his choice, rather than paying the equivalent fund to the Union for charitable purposes. They rely heavily upon the district court's finding that Anderson's refusal to pay his charitable contribution to the Union was based on his general distrust of unions, rather than on religious beliefs. Finally, they argue that Anderson's suggestion of accommodation would work undue hardship as a matter of law because Anderson would become a "free rider."

The burden was upon the appellees, not Anderson, to undertake initial steps toward accommodation. They cannot excuse their failure to accommodate by pointing to deficiencies, if any there were, in Anderson's suggested accommodation. Thus, Anderson's motivation in selecting his own charity is irrelevant. Moreover, the district court's finding is contrary to the parties' stipulation of fact that teachings of Anderson's Church forbade making contributions to unions.

Appellees are left with the argument that Anderson's refusal to pay either his union dues or the equivalent of union dues to the Union for a charity of the Union's choice would be an undue hardship as a matter of law because the means of accommodation would create "free riders." The district court accepted this argument; we do not. We follow the Sixth Circuit in *McDaniel v. Essex International, Inc., supra,* 571 F.2d 338, with which our case is almost identical.

McDaniel was a Seventh Day Adventist who had a bona fide religious belief that membership in the union and the payment of union dues was a violation of her religion. She requested her employer and the union to make an accommodation to her religious beliefs, and she suggested that she would be willing to contribute an amount equal to the union dues to a non-sectarian charity to be chosen by the union and her employer. Neither responded to her request,

and she was discharged for her failure to adhere to the requirements of the union security agreement. The district court granted summary judgment in favor of the union and the employer, accepting their contentions that the accommodation that the employee suggested would work an undue hardship on the union as a matter of law because non-payment of union dues adversely affected the "financial core" of the union and thus impaired its ability to fulfill its collective bargaining functions. The *McDaniel* court reversed. The court pointed out that the union security provisions of the Taft-Hartley Act (29 U.S.C. § 158(a)(3), (b)(2) (1970)) "do not relieve an employer or a union of the duty of attempting to make reasonable accommodation to the individual religious needs of employees. [citations omitted]. The burden is on Essex and IAM to make an effort at accommodation and, if unsuccessful, to demonstrate that they were unable to reasonably accommodate the plaintiff's religious beliefs without undue hardship. The district court found that it would work an undue hardship on IAM to forego the dues payment by the plaintiff. There is no factual basis in the record for this conclusion. In *Draper v. U.S. Pipe & Foundry Co., supra* [(6th Cir. 1976) 527 F.2d 515], this court expressed its skepticism concerning 'hypothetical hardships' based on assumptions about accommodations which have never been put into practice. 527 F.2d at 520." (*Id.* at 343.)

Here, as in *McDaniel*, neither the Union nor the employer offered any evidence to prove that union members thought that a person was a free rider if he paid the equivalent of union dues to a charity, nor was there any evidence offered to prove as a fact that the accommodation of Anderson would otherwise have been an unduly difficult problem for the Union. It relied simply upon general sentiment against free riders.

Undue hardship means something greater than hardship. Undue hardship cannot be proved by assumptions nor by

opinions based on hypothetical facts. Even proof that employees would grumble about a particular accommodation is not enough to establish undue hardship. As the Supreme Court pointed out in *Franks v. Bowman, supra*, 424 U.S. at 775, *quoting United States v. Bethlehem Steel Corp.* (2d Cir. 1971) 446 F.2d 652, 663: " 'If relief under Title VII can be denied merely because the majority group of employees, who have not suffered discrimination, will be unhappy about it, there will be little hope of correcting the wrongs to which the Act is directed.' "[4]

We conclude that the Union and General Dynamics failed to carry their burden of proof, and, accordingly, the judgment must be reversed.[5] We also conclude that Anderson is entitled to a reasonable attorney's fee as part of his costs, pursuant to 42 U.S.C. § 2000e-5(k), the amount of which shall be fixed by the district court on remand.

Reversed and remanded for further proceedings consistent with the views herein expressed.

Filed September 7, 1978

EMIL E. MELFI
Clerk U.S. Court of Appeals

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[4] Appellees can take no comfort from the observation in Yott v. North American Rockwell Corp., *supra*, 501 F.2d at 403: "If appellees are able to demonstrate that any suggested accommodation would impose undue hardship on the Union or the employer's business, then Yott's discrimination claim should fail." We reversed in *Yott* because the appellees had not demonstrated that the suggested accommodation would impose undue hardship, and, as we have explained, the appellees in this case have not done so either.

[5] The appellees attacked the constitutionality of the provisions of Title VII in issue in this case, and they renew that attack, at least obliquely, on appeal. The district court did not reach any constitutional issue, and under these circumstances we also decline to address any constitutional questions.

STATUTES

The Railway Labor Act

45 U.S.C. § 152, *Eleventh*

Notwithstanding any other provisions of this Act, or of any other statute or law of the United States, or Territory thereof, or any State, any carrier or carriers as defined in this Act and a labor organization or labor organizations duly designated and authorized to represent employees in accordance with the requirements of this Act shall be permitted—

(a) to make agreements, requiring, as a condition of continued employment, that within sixty days following the beginning of such employment, or the effective date of such agreements, whichever is the later, all employees shall become members of the labor organization representing their craft or class: Provided, That no such agreement shall require such condition of employment with respect to employees to whom membership is not available upon the same terms and conditions as are generally applicable to any other member or with respect to employees to whom membership was denied or terminated for any reason other than the failure of the employee to tender the periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership.

(b) to make agreements providing for the deduction by such carrier or carriers from the wages of its or their employees in a craft or class and payment to the labor organization representing the craft or class of such employees, of any periodic dues, initiation fees, and assessments (not including fines and penalties), uniformly required as a condition of acquiring or retaining membership, Provided, That no such agreement shall be effective with respect to any individual employee until he shall have furnished the employer with a written assignment to the labor organization of such membership dues, initiation fees, and assessments, which shall be revocable in writing after the expiration of one year or upon the termination date of the applicable collective agreement, whichever occurs sooner.

(c) The requirement of membership in a labor organization in an agreement made pursuant to subparagraph (a) shall be satisfied, as to both a present or future employee in engine, train, yard, or hostling service, that is, an employee engaged in any of the services or capacities covered in section 3, first (h) of this act [§ 153 of this title] defining the jurisdictional scope of the first division of the National Railroad Adjustment Board, if said employee shall hold or acquire membership in any one of the labor organizations, national in scope, organized in accordance with this act and admitting to membership employees of a craft or class in any of said services; and no agreement made pursuant to subparagraph (b) shall provide for deductions from his wages for periodic dues, initiation fees, or assessments payable to any labor organization other than that in which he holds membership: Provided, however, That as to an employee in any of said services on a particular carrier at the effective date of any such agreement on a carrier, who is not a member of any one of the labor organizations, national in scope, organized in accordance with this act and admitting to membership employees of a craft or class in any of said services, such employee, as a condition of continuing his employment, may be required to become a member of the organization representing the craft in which he is employed on the effective date of the first agreement applicable to him: Provided, further, That nothing herein or in any such agreement or agreements shall prevent an employee from changing membership from one organization to another organization admitting to membership employees of a craft or class in any of said services.

(d) Any provisions in paragraphs fourth and fifth of section 2 of this act [this section] in conflict herewith are to the extent of such conflict amended.

PERTINENT PROVISIONS OF TITLE VII OF THE CIVIL RIGHTS ACT OF 1964

42 U.S.C. § 2000e et seq.

§ 2000e-2. Discrimination because of race, color, religion or national origin

(a) Employers. It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

(b) Employment agency. It shall be an unlawful employment practice for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin, or to classify or refer for employment any individual on the basis of his race, color, religion, sex, or national origin.

(c) Labor organization. It shall be an unlawful employment practice for a labor organization—

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;

(2) to limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

§ 2000e. Definitions

For the purpose of this title [42 USCS §§ 2000 et seq.]—

(j) The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.

In The

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-706

SOUTHERN PACIFIC TRANSPORTATION COMPANY,
UNITED TRANSPORTATION UNION AND
UNITED TRANSPORTATION UNION, LOCAL 807,
Petitioners,

v.

DUANE TERRELL BURNS,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Respondent, Duane Terrell Burns, hereinafter called "Burns", hereby files his opposition to granting the Petition for Writ of Certiorari in the above-captioned matter of Southern Pacific Transportation Company (hereinafter "SPTC"), and the United Transportation Union, United Transportation Union, Local 807 (hereinafter collectively referred to as "UTU" or sometimes as "Union").

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the

Ninth Circuit has not been reported at the time of filing this opposition. This Opinion is reproduced in its original form in the Appendix, along with its companion case, *Anderson v. General Dynamics, et al.* The Opinion of the United States District Court for the District of Arizona is reproduced in the Appendix to the Petition for Certiorari.

JURISDICTION

The Court of Appeals entered judgment on September 7, 1978. The Petition for Writ of Certiorari was filed within ninety (90) days of that date. Jurisdiction of this Court is properly conferred under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

Did the SPTC and the UTU carry their burden of proof to show a reasonable accommodation to this employee's religious beliefs could not be made without undue hardship.

STATUTORY PROVISIONS INVOLVED

The relevant portion of all the Acts are set forth in the Petition and Appendix for Certiorari.

COUNTER-STATEMENT OF THE CASE

Burns has been an employee of the SPTC since December 22, 1955. He is currently classified as a brakeman and conductor by the SPTC. For many years last past, the UTU, and its predecessor unions, has represented a unit of brakemen and conductors of which Burns is a part. Pursuant to the provisions of the Railway Labor Act, the UTU and SPTC have contracted for employees similarly situated as Burns to pay monies to the UTU as a condition of continued employment.

Burns is also a member of a religious organization known as

the Seventh-Day Adventist Church to which he has belonged for over seven (7) years. The Seventh-Day Adventist Church is a religious organization with approximately 500,000 members in the United States, and about two and a half million members in the world. For at least the last 75 years it has been the teaching of the Church that a Seventh-Day Adventist should not join nor financially support a labor organization. For those employees in service as of July, 1955, who are members of a bona fide or recognized religious group, and who object to membership in a labor organization, the UTU and the SPTC have contracted that these employees will only be required to pay monies to the UTU equivalent to its usual dues, fees and assessments. The Union and SPTC have offered to Burns the same option available in 1955, even though the agreement by its express terms does not apply to him.

Burns has maintained membership in the UTU during his tenure with the employer, and served as local chairman of UTU, Local 807, from January 1, 1970 thru July 9, 1973. Burns resigned as local chairman in July, 1973, and withdrew from the Union on February 26, 1974, because he had come to the understanding that his union affiliation was in direct conflict with his religious beliefs. At the time of his withdrawal from the Union, he ceased financial support to the UTU based on his sincere religious beliefs, and the jeopardy in which he believed his eternal salvation would be placed. The Church teaches its members not to join or financially support a union based on its interpretation of the Bible. Burns sincerely believes individually this teaching of the Church, and construes literally the teachings of Ellen G. White, a prophetess to the Seventh-Day Adventist Church. Burns has offered to pay the equivalent of union dues

and assessments to a designated charity in lieu of the contractual obligation. He is prepared to offer proof to the Union of the charity payments.

Attempting an accommodation to his religious beliefs, Burns requested a conference with both the UTU and SPTC prior to his withdrawal from the Union. He requested and arranged to meet personally with representatives of the Company and Union. At that time, Burns suggested that he, in fact, pay the equivalent of the union dues to a designated charity in satisfaction of his contractually imposed obligations. Upon refusal by the UTU and SPTC to consider any accommodation in respect to dues and in anticipation of his discharge, Burns filed charges of religious discrimination with the EEOC in Phoenix, Arizona. Thereafter, he obtained a Right-to-Sue letter, and he filed his Complaint in the District Court on March 1, 1974. The Original Complaint sought injunctive relief, attorney's fees and damages. After the Company and Union agreed that Burns could continue to work while the litigation was pending, the Complaint was amended to seek only injunctive relief from discharge and attorney's fees. The case was tried by the court without a jury, resulting in judgment against him, and Burns appealed to the Ninth Circuit Court of Appeals.

The Union on appeal before the Ninth Circuit urged affirmance of the district court on essentially two grounds: (1) that the UTU had a right and duty to reject Burns' proposed accommodation; and (2) the UTU would not attempt any accommodation because it was impossible as a matter of law given Burns' beliefs (Brief of the UTU and Reply to the EEOC Brief to the Ninth Circuit). Likewise, the SPTC, setting aside the constitutional question, basically urged affirmance twofold: (1)

Title VII did not require it to accommodate religious beliefs involving union dues in face of §2, Eleventh of the Railway Labor Act; and (2) if Title VII did require it to accommodate, it had done so by only requiring "financial core" membership (Brief and Reply Brief, SPTC to the Ninth Circuit).

The circuit court dealt squarely and directly with all of these contentions holding that the SPTC and UTU had not carried its burden to accommodate or by showing undue hardship. In reversing the district court, the appellate court held that the UTU and SPTC had made no effort to accommodate Burns' particular religious beliefs. Further, the Ninth Circuit rejected the argument that payment of the equivalent of union dues to a charity (a form of accommodation which has been coined "charity-substitution"), was an undue hardship as a matter of law. By implication, the Panel found that "financial core membership" was no accommodation at all inasmuch as actual membership is not required by the union security arrangement. Finally, the court held that the evidence offered did not demonstrate that undue hardship, in fact, existed.

Thus, the UTU and SPTC seek certiorari on the very limited issues of (1) whether they carried their burden of proof because undue hardship existed as a matter of law; or (2) if the evidence supports that undue hardship in fact existed despite their failure to offer any accommodation.

ARGUMENTS AGAINST GRANTING THE WRIT

I. *There is no conflict among the Circuit Court of Appeals that the union and employer have the burden to accommodate unless they demonstrate undue hardship.*

A.

The Ninth Circuit correctly held that the UTU and SPTC failed to carry their burden of proof.

The Ninth Circuit in the instant case necessarily found that the UTU and SPTC failed to carry their burden of proof. Their only claim of accommodation was to excuse Burns from actual membership, but require payment of monies to the union. This clearly was no accommodation at all, and was directly violative of Burns' religious beliefs. The Ninth Circuit phrased it:

> "Thereafter the burden was on the Company and the Union to prove that they made good faith efforts to accommodate Burns' religious beliefs, that the efforts were unsuccessful, and that they were unable reasonably to accommodate those beliefs without undue hardship. (42 U.S.C. § 2000e(j); *Anderson v. General Dynamics Convair Aerospace Division, supra)*" (original Opinion, Pg. 4, Appendix) (CA 9, 1978).

Every Circuit Court of Appeals to decide this question has consistently held that the union and employer have a statutory duty to attempt accommodation short of undue hardship. Consistently, each circuit has held that the union and employer, not the employee, has the burden of proving undue hardship:

In 1976, the Fifth Circuit held:

> [1] "[A]ll reasonable accommodations of appellant's religious beliefs, including one which permits their nonpayment of union dues or the equivalent while continuing regular work assignments with their employer, is

> mandated by the sweep of 701(j)." *Cooper v. General Dynamics* 533 F2d 163, 170 (CA 5, 1976); hearing and rehearing in banc denied 537 F2d 1143; cert. denied sub nom. *International Association of Machinists v. Hopkins* 433 U.S. 908 (1977).

[2] In 1978, other circuit courts said:

> "The burden is on Essex and IAM to make an effort at accommodation and, if unsuccessful, to demonstrate that they were unable to reasonably accommodate the employee's religious beliefs without undue hardship." *McDaniel v. Essex International, Inc.* 571 F2d 338, 343 (CA 6, 1978).
>
> "[O]nce the Plaintiff here had established that his practice . . . was "religious" . . ., the burden shifted to the employer to demonstrate that he is unable to reasonably accommodate to an employee's . . . religious observance or practice without undue hardship on the conduct of the employer's business." *Redmond v. GAF Corp.* 574 F2d 897, 901 (CA 7, 1978).
>
> "The burden was thereafter upon GD and the Union to prove that they made good faith efforts to accommodate Anderson's religious beliefs, and, if those efforts were unsuccessful, to demonstrate that they were unable to reasonably accommodate his beliefs without undue hardship." *Anderson v. General Dynamics* (original Opinion, Pg. 6-7, Appendix) (CA 9, 1978).

[3] Interpreting 29 C.F.R. 1605.1, the genesis to 701(j) (42 U.S.C. § 2000e(j)), in 1974, the Ninth Circuit said:

> "Thus we agree with *Reid* and find that accommodation is required . . . If appellees are able to demonstrate that any suggested accommodation would impose undue hardship . . ." *Yott v. North American Rockwell* 501 F2d 398, 403.

B.

UTU and SPTC attempted no accommodation, reasonable or otherwise, to the employee's religious beliefs.

The UTU and SPTC admittedly made no attempt to accommodate Burns' religious beliefs regarding financial support of unions. Their only other "escape hatch" was an argument that any accommodation would constitute undue hardship as a matter of law which was rejected both in *Burns* and *Anderson;* or, that the waiver of actual membership satisfied the duty to accommodate *and* constituted undue hardship. In reviewing the evidence, the Panel found the offer of proof did not show undue hardship. This finding is both consistent with the record and necessitated by the fact that §2, Eleventh of the Railway Labor Act only provides statutory authority for financial core membership.

The waiver of actual membership is *no* accommodation at all as the UTU and SPTC could only contract to require Burns to pay monies, and not join, the union. The Supreme Court had said as much in dicta in *Railway Employees Department v. Hansen* 351 U.S. 225 (1955), but the Fifth Circuit decided it squarely in the recent case of *Marden v. International Association of Machinists* 576 F2d 576 (CA 5, 1978). The union security arrangement of §2, Eleventh is an extraction from 8(a)(3) of the National Labor Relations Act, and "financial core" membership has long been the law of the National Labor Relations Act since *NLRB v. General Motors* 373 U.S. 734 (1963) and its progeny.[1]

[1] *McDaniel, supra,* at 342-43; *Abood v. Detroit Board of Education* 431 U.S. 209, 217, n. 10 (1977); *NLRB v. Hershey Food Corp.* 513 F2d 1083 (CA 9, 1975); *Union Starch and Refining Co. v. NLRB* 186 F2d 1008 (CA 7, 1951); *Local 1104, CWA v. NLRB* 520 F2d 411 (CA 2, 1975); *AFTRA and William F. Buckley, Jr.* 222 NLRB No. 34.

The appellate courts have consistently agreed on the union and company's duty to accommodate religious beliefs in light of the union security provision, and have consistently reversed those cases where no accommodation was attempted. If no accommodation was attempted, the significant issue under federal law claimed by UTU and SPTC is simply reduced to evidentiary implication.

II. *The UTU and SPTC could have, in fact, provided a reasonable accommodation.*

A.

AFL-CIO Policy

The official policy statement of the AFL-CIO says that unions should immediately adopt policies "giving to religious objectors the option of contributing to a non-religious charity sums equal to union dues and initiation fees". These men intimately knowledgeable in the affairs of the Union say that it could be done, should be done, and has been done by a number of national and international unions. This policy statement of the AFL-CIO has been in full force and effect for 13 years, and has not been altered or amended in any way.

The AFL-CIO position statement was based on the recommendation of no less an expert than George Meany who said:

> ". . . In other cases religious objectors have not participated at all in union enterprises, *but have paid the equivalent of dues to a union charitable fund or to an agreed upon charity* . . .
>
> In any event, I believe the unions, and employers too should accommodate themselves to genuine individual religious scruples, and I am sure that all of our unions will

take that view too. [I intend accordingly to propose to the AFL-CIO Executive Council that it should adopt a strong policy statement to that effect.]; and that the International Unions affiliated with the AFL-CIO undertake to insure that their local unions scrupulously respect individual religious reservations in the administration of union security arrangements." (Emphasis Supplied) (George Meany's letter to the Honorable Frank Thompson, Jr., Chairman, Special Subcommittee on Labor of the House Committee on Education and Labor, dated May 28, 1965, at pg. 2).

B.

Congressional Action

As further evidence of the AFL-CIO's expertise and maturity in the area, it recently supported a "conscience clause" amendment in both houses of Congress. A charity-substitution arrangement, identical to that sought by Burns, was supported by the AFL-CIO and became a part of the Labor Law Reform Act. Although the Labor Law Reform Act ultimately did not become law, it is indicative of the AFL-CIO's support on this point. No less an advocate for the union than Representative Frank Thompson, joined hands with other House leaders to secure House approval for charity-substitution. Appearing in the Appendix is a reproduction of the debate in the House, and is provided as an illustration that charity-substitution is an appropriate response to the accommodation/undue hardship standard.

Congress did pass into law a recent provision providing that an employee of a health care institution who holds a religious belief against joining or paying money to a union, cannot be required to join or support a labor organization as a condition of continued

employment.[2] In order to deal with any potential "free rider" problems, Congress provided that such employee would pay the equivalent of dues and initiation fees to a charity recognized by the Internal Revenue Code. The first question one might ask in looking at the legislative history of the Hospital Amendment was why they needed charity-substitution spelled out if it had been covered by 701(j) as contended by Burns. The answer is that the Hospital Amendment gave extended protection to the employee which would not vanish if undue hardship was proven. In other words, accommodation is a right qualified by undue hardship to an individual's religious beliefs. Exemption is an absolute right with no qualification as to undue hardship.

C.

State Laws

The feasibility of charity-substitution is evidenced by the statutes of Washington, Oregon, Alaska and Montana enacting the exact accommodation sought by Burns.[3] Those states say charity-substitution is working elsewhere in the field of public employment, and are consistent with the United States Congress legislation in the area of hospital care.

The foregoing could be concisely reduced to the thought that the Union didn't provide accommodation to Burns because they didn't try to. With no attempted accommodation at all, the Ninth Circuit correctly held that they had failed their burden under 701(j).

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[2] Public Law 93-360.

[3] Revised Code of Washington, 41.56.122; Civil Statute, 243-666 of the State of Oregon; Civil Statute. 59-1603 of the State of Montana; A.S. 23.40.225.

III. *701(j) creates equality in employment by equal treatment of Burns to similarly situated employees.*

The Union and SPTC next argue, although they attempted no accommodation, this Court should grant certiorari because any accommodation would not leave Burns similarly situated as other employees. In support of this proposition, they cite this Court's decision in *Trans World Airlines, Inc. v. Hardison* 432 U.S. 63 (1977). *Hardison,* supports, rather than undermines the holding in *Burns.* Basically, *Hardison* involves a defense that the company and union had taken adequate steps to accommodate the employee's religious beliefs, and to construe the statute to require further efforts of accommodation would constitute undue hardship, *supra,* at 432 U.S. 77. At Hardison's request, he bid for a job in Building 2 where he could work the day shift. While he had sufficient seniority under the applicable collective bargaining agreement to avoid work on Saturdays in Building 1, he ranked next to last on the seniority list in Building 2. Hardison's religion forbid him to work on Saturdays. After Hardison's transfer to Building 2, he was asked to work on Saturdays when other employees went on vacation. When he refused, he was fired. The district court found that TWA *attempted* to accommodate Hardison by:

(1) agreeing with the Union to permit Hardison to swap time off with other employees;

(2) excusing him on religious holidays if he was willing to fill in on the employees' other religious days; and,

(3) attempting to find him another job. *Hardison v. Trans World Airlines* 375 F.Supp. 877, 878 (W.C. Mo., 1974); 432 U.S. at 68-9.

None of these accommodations succeeded. The district court found that further accommodation would have caused TWA undue hardship because TWA only had two remaining choices. One was to let Hardison have his day off and attempt to replace him. The court found this to be extremely difficult. Hardison's job was essential; to replace him would have left another position vacant; to employ someone not already assigned to Saturday work would have caused eight hours premium pay each Saturday; to have let the position empty would have impaired the supplying of parts for essential airline operations. *Id.* 375 F.Supp. at 889, 891. A second alternative, forcing other employees to trade shifts or jobs would have violated contractual seniority provisions and would have subjected TWA to grievances. *ID.* at 899. "Title VII", the district court said, "does not force TWA to impose upon other employees because of one employee's religious beliefs." *Id.* at 891.

The Supreme Court largely adopted the district court's analysis of the facts and its interpretation of the law. The Court agreed with the district court that TWA "had done all that could possibly be expected within the bounds of the seniority system", 432 U.S. 77, "all that it could do . . . without incurring substantial cost or violating the seniority rights of other employees." *Id.* at 83, n. 14.

The Court's theme that to accommodate an employee's religious beliefs by discriminating against other employees reflects the court's concern that Title VII be used to create full equality for persons irrespective of religion or belief. In the present case, 701(j) creates equality by allowing an employee whose religion forbids financial support to unions to allocate the same amount that union supporters pay as dues to an equally

legitimate socially desirable, charitable organization. That interpretation ensures that every employee is taxed identically, that each suffers the same loss of income. At the same time, it ensures the employee with strong religious convictions can be true to his faith, but without imposing additional burdens on employees with contrary beliefs. Under *Hardison, Cooper, Yott, McDaniel,* and *Anderson,* reasonable accommodation demands such balance of beliefs where the burden on each employee remains the same after accommodation as before.

To hold, as would the Union, that Mr. Burns should sacrifice either his employment or his beliefs when he is prepared to pay the financial burden as other employees, constitutes discrimination and inequality and violation of the statute which provides that "similarly situated employees are not to be treated differently solely because they differ with respect to . . . religion". *Hardison, supra.* It is fair to assume when this Court denied certiorari in *Cooper,* after its decision in *Hardison,* that it was satisfied that both cases read together present a correct interpretation of 701(j) in union security cases.

IV. ***Other reasons against granting certiorari.***

The Union and SPTC also allege a long shopping list of miscellaneous reasons why the Court should grant certiorari. Basically, each of these issues have been decided against them by the lower appellate courts in general, or have been decided against them specifically in *Cooper.*

(1) Petitioners urge that 701(j) does not include accommodation regarding union security issues. Cf. *Cooper* 553 F2d at 168; *Yott* 501 F2d at 402;

(2) That 701(j) adds nothing to the constitutional argument

prior to the passage of 701(j). Cf. *Hammond v. United Paper Workers* 462 F2d 174, 175 (CA 6, 1972);

(3) §2, Eleventh could not be altered in any way by subsequent legislation. Cf. *Cooper* 553 F2d at 169; and,

(4) Enactment of Section 19 of the Hospital Amendment shows that 701(j) was not meant to cover religious beliefs regarding union dues. Cf. *Cooper* 553 F2d at 169-70.

CONCLUSION

The UTU and SPTC's position that union security authorized by §2, Eleventh of the Railway Labor Act is the impregnable pivotal point of our labor policy is untenable. The interest raised for union security and under Title VII can be read side by side, and they can be harmonized by implementing Congress' mandate so that discrimination is removed from the field of employment. Harmonizing necessarily requires the relinquishment of majoritarian rights only to the extent that would not cause undue hardship.

The Union and employer attempted no accommodation at all. They did not carry their burden of proof, and wholly failed to demonstrate any undue hardship. The court consistently held that it is their burden to accommodate or show that undue hardship would exist by any form of reasonable accommodation.

The courts for the Fifth, Sixth, Seventh and Ninth Circuits are in complete agreement that under Title VII there exists a duty to accommodate without undue hardship. The Supreme Court of the United States says there exists a duty for the union and company to accommodate short of incurring undue hardship. It is implicit in this conclusion that accommodation is owed, and that 701(j) reaches and complements §2, Eleventh as a pro-

nouncement of today's National Labor Policy. The UTU and SPTC failed to carry their burden of proof that a reasonable accommodation to Burns' religious beliefs would constitute undue hardship.

For the above reasons, the Writ of Certiorari should be denied.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 76-1188

Duane Terrell Burns,
Plaintiff-Appellant,

v.

Southern Pacific Transportation Co., et al.,
Defendants-Appellees.

Appeal from the United States District Court for the District of Arizona

Before: HUFSTEDLER and GOODWIN, Circuit Judges, and LUCAS*, District Judge

OPINION

HUFSTEDLER, Circuit Judge:

Burns brought this Title VII action seeking to enjoin his employer, Southern Pacific Transportation Company ("Company") and the United Transportation Union and its local ("Union") from discharging him for his refusal to pay union dues and assessments in violation of his sincerely-held religious beliefs. The district court held that the Union and the Company had fulfilled their statutory duties of accommodation required by the Civil Rights Act of 1964, as amended (42 U.S.C. §§ 2000e *et seq.*, particularly § 2000e(j) (1970 Supp. 2)) when they offered to relieve Burns of his obligation to belong to the Union and that no further accommodation was required because payment of the dues-equivalent to a charity worked an undue hardship upon the Union and its members by relieving Burns of paying his fair share of union expenses. The district court also rejected Burns' attack upoon the constitutionality of the application to him of §2, *Eleventh* of the Railway Labor Act

* Honorable Malcolm M. Lucas, United States District Judge, Central District of California, sitting by designation.

(45 U.S.C. §152, *Eleventh* (1970). We reverse in part, holding that the Company and the Union failed to carry their burden of proving good faith efforts reasonably to accommodate Burns' religious beliefs and their further burden of proving that no accommodation reasonably could be made without undue hardship to the Union or the Company. We affirm the district court's rejection of Burns' constitutional claim.

Burns has been employed by the Company since 1955; he is classified as a brakeman and conductor. For many years he has also been a member of the Seventh Day Adventist Church. He withdrew from the Union on February 26, 1974, when he became aware that his affiliation with the Union and his payment of dues to the Union were in direct conflict with the teachings of his Church. The district court found on ample evidence that Burns has a sincere religious belief in the teachings of his Church forbidding membership in labor organizations and contributions to such organizations. He requested an informal accommodation to his religious beliefs and asked to meet personally with representatives of the Union and the Company. He has offered to pay the equivalent of union dues and assessments to a designated charity and to offer proof to the Union of such charity payments. The Union and the Company were willing to waive any requirement of membership in the Union and participation in union activities, but both declined to consider any accommodation which would involve Burns' not paying union dues and assessments.

Upon refusal by the Union and the Company to consider any accommodation in respect of dues and in anticipation of his discharge, Burns filed charges of religious discrimination with the Equal Employment Opportunity Commission in Arizona.

Thereafter, he obtained a right-to-sue letter, and he filed this complaint in the district court on March 1, 1974. The original complaint sought injunctive relief, attorney's fees, and damages. After the Company and the Union agreed that Burns could continue to work while the litigation was pending, the complaint was amended to seek only injunctive relief from discharge and attorney's fees. The case was tried by the court without a jury, resulting in judgment against him, and Burns appeals.

At all material times the Company and the Union have had in effect a Union security agreement requiring all employees, as a condition of employment, to be members in good standing of the Union. A companion agreement between the predecessor of the Union and the Company contained a provision which gives some relief to religious objectors by stating that an employee having religious scruples against joining a union "will . . . be deemed to have met the requirements of the Union Shop Agreement if he agrees to and does pay initiation fees, periodic dues and assessments of the organization representing his craft or class signatory hereto."

Burns fully met his burden of proving a *prima facie* case of religious discrimination in violation of Title VII. He proved that he had a bona fide belief that union membership and the payment of union dues were contrary to the teachings of his Church. He informed his employer and the Union about his religious views. He was thereafter threatened with discharge for his refusal to pay union dues and assessments. *(Anderson v. General Dynamics Convair Aerospace Division,* (9th Cir. 1978) ... F.2d ....) Thereafter the burden was on the Company and the Union to prove that they made good faith efforts to

accommodate Burns' religious beliefs, that the efforts were unsuccessful, and that they were unable reasonably to accommodate those beliefs without undue hardship. (42 U.S.C. § 2000e(j); *Anderson v. General Dynamics Convair Aerospace Division, supra.)*

We begin our analysis with *Trans World Airlines v. Hardison* (1977) 432 U.S 63. The Court noted there that Congress did not define the degree of accommodation which is required of an employer under section 701(j) of the Civil Rights Act (432 U.S. at 73-76), but that the legislative history is at least clear that "Congress intended to require some form of accommodation" and to change prior case law which had condoned an employer who "had not made any effort whatsoever to accommodate the employee's religious needs." (*Id.* at 74, n.9) Thus, the employer is required to take some steps in negotiating with the employee to reach a reasonable accommodation to the particular religious beliefs at issue. *(Anderson v. General Dynamics Convair Aerospace Division, supra,* ... F.2d at ...; *McDaniel v. Essex International, Inc.* (6th Cir. 1978) 571 F.2d 338, 341-42.)

Once the employer has made more than a negligible effort to accommodate the employee *(Trans World Airlines v. Hardison, supra,* 432 U.S. at 77) and that effort is viewed by the worker as inadequate, the question becomes whether the further accommodation requested would constitute "undue hardship." Once again, this term is not defined by the Civil Rights Act, but the burden of proving undue hardship rests upon the employer or union. The *Hardison* Court found that the employer had demonstrated undue hardship where the accommodation requested by the employee (a four-day work week) would have effectively required preferential treatment on the basis of

religion for Sabbatarians, causing sacrifices or dislocation in the work schedules of fellow-workers or requiring the employer to hire outsiders to work Saturday shifts at "premium wages." (*Id.* at 81-84.) The Court held that where the impacts upon co-workers or costs are greater than *de minimis,* undue hardship is demonstrated. (*Id.* at 84.) We now apply the *Hardison* principles to the facts herein.

The Company and the Union made no effort to accommodate Burns' particular religious beliefs. In effect, they informed Burns that his only alternative was to accept the terms of the existing contract which freed him from the obligation of membership if he paid dues to the Union. Burns' religious beliefs, however, forbade payment of dues to the Union. Neither the Company nor the Union attempted to accommodate this belief. Their position therefore is that no accommodation is possible when an employee refuses to pay union dues and assessments because non-payment of such sums places an undue hardship on the Union as a matter of law or under proof offered in the case.

We rejected the contention that the substitution of payments to a charity for payment of union dues was an undue hardship as a matter of law in the companion case, *Anderson v. General Dynamics Convair Aerospace Division, supra.*[1] *(Accord McDaniel v. Essex International, Inc., supra,* 571 F.2d 338.) We therefore turn to the examination of the record to decide whether the Union and the Company proved as a matter of fact

[1] No difference in result can be based upon the fact that the Union security agreement considered in *Anderson* responded to § 8(a)(3), (b)(2) of the Taft-Hartley Act, 29 U.S.C. § 158(a)(3), (b)(2) (1970) and that of the Union security provisions in this case were authorized under the similar provisions of Section 2, *Eleventh* of the Railway Labor Act, 45 U.S.C. § 152. (McDaniel v. Essex Internat'l, Inc. (6th Cir. 1978) 571 F.2d 338.)

that substituted payments would create an undue hardship to the Union and the Company.

Appellees' hardship case was based in part upon opinions that "free rider" problems could cause serious dissention among employees, resulting in inefficiency of operation. These witnesses, however, did not attempt to relate a general sentiment against free riders either to Burns or to a person who, like Burns, made payments equivalent to union dues to a charitable organization. The Union and the Company also argued that, based on unofficial and unscientific polls, employee dissatisfaction with persons who were free riders or who received different treatment of any kind was not hypothetical. We are not persuaded. We agree with the Sixth Circuit, speaking in *Draper v. U.S. Pipe & Foundry Co.* (6th Cir. 1976) 527 F.2d 515, 520:

> "We are somewhat skeptical of hypothetical hardships that an employer thinks might be caused by an accommodation that has never been put into practice. The employer is on stronger ground when he has attempted various methods of accommodation and can point to hardships that actually resulted."

As we noted in *Anderson V. General Dynamics Convair Aerospace Division, supra,* undue hardship requires more than proof of some fellow-worker's grumbling or unhappiness with a particular accommodation to a religious belief. (... F.2d at ....) An employer or union would have to show, as in *Hardison,* actual imposition on co-workers or disruption of the work routine.

The Union also contends that it would suffer substantial financial hardship if Burns were permitted to pay the equivalent of union dues and assessments to a charitable fund

because the costs of collective bargaining would be disproportionately borne by union members and because the administrative costs in keeping track of Burns' charitable contributions would be more than *de minimis.* Excusing Burns from paying his dues to the Union would deprive the Union of $19 per month. The allocation of dues payments was: $7 to the Local, distributed half for salaries and expenses and the other half to the Local's Committee of Adjustment; $5 to the International Union; $4 to the Union's General Committee of Adjustment; and $3 to the State Legislative Board. There was testimony from one of the Union officers that the loss of Burns' $19 per month dues "wouldn't affect us at all." In our view, the loss of dues to the Union is *de minimis,* even if so necessary to its fiscal well-being that its equivalent would be collected from the Local's 300 members at a rate of 2 cents each per month. The district court did not decide to the contrary as in *Hardison.* (*See* 432 U.S. at 84, n.15.) Rather, the district court accepted the Union's contention that accommodating Burns would open the gate to excusing vast numbers of persons who claimed to share Burns' beliefs, thence resulting in a greater than *de minimis* burden on the Union and Union members. The record does not support this speculation. The evidence was that only three persons subject to the Local's jurisdiction were Seventh Day Adventists.[2] If, in the future, the expressed fear of widespread refusal to pay union dues on religious grounds should become a

[2] The concern that quantities of religious objectors would deplete the financial resources of the Union is not shared by George Meany, President of the AFL-CIO. A letter from George Meany was introduced into evidence in which Mr. Meany expressed his opinion that religious views such as those of Burns should be accommodated to respect individual religious reservations in the administration of union security agreements and suggesting that an appropriate method for accommodation would be the payment of the equivalent of dues to a union charitable fund or to an agreed-upon charity.

reality, undue hardship could be proved.[3] But on the present record, no substance was given to these apprehensions. (*See McDaniel v. Essex International, Inc., supra,* 571 F.2d at 343-44.)

We quickly dismiss the contention that administrative difficulties in accommodating Burns' religious beliefs would cause undue hardship. No evidence was presented on this point, other than testimony that keeping track of Burns' charitable contributions would entail some bookkeeping. No one testified concerning the cost of the minor modifications which would be thereby required, and we cannot say that the modest amount of paper work would impose even *de minimis* cost.

The district court correctly rejected Burns' constitutional challenge to section 2, *Eleventh* of the Railway Labor Act. As Burns necessarily concedes, the constitutional issue has been repeatedly resolved against him. (*E.g., Yott v. North American Rockwell Corp.* (9th Cir. 1974) 501 F.2d 398, 403-04.)

For the first time on appeal, the Company has challenged the constitutionality of § 701(j) of the Civil Rights Act, as amended, on the ground that it violates the establishment clause of the First Amendment. We decline to reach the constitutional question under these circumstances. If the Company is so inclined, it can raise the constitutional question in the district court following remand.

Burns is entitled to a reasonable attorney's fee as a part of his

[3] *See* Trans World Airlines v. Hardison, *supra,* 432 U.S. at 31 (it would be anamolous to conclude that reasonable accommodation requires actions depriving other employees of their rights); *see also id,* at 90 (Marshall, J., dissenting) ("important constitutional questions would be posed by interpreting the law to compel employers (or fellow-employees) to incur substantial costs to aid the religious observor.").

costs, pursuant to 42 U.S.C. §2000e-5(k), the amount of which shall be fixed by the district court on remand.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with the views herein expressed.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 77-2180

David Anderson,
Plaintiff-Appellant,

v.

General Dynamics Convair Aerospace Division, a corporation, and International Association of Machinists and Aerospace Workers, AFL-CIO, Silvergate District Lodge 50, an association,
Defendants-Appellees.

Appeal from the United States District Court for the Southern District of California

Before: HUFSTEDLER and GOODWIN, Circuit Judges, and LUCAS*, District Judge

OPINION

HUFSTEDLER, Circuit Judge:

Anderson, a former employee of General Dynamics Convair Aerospace Division ("General Dynamics") brought this title VII action against General Dynamics and the International Association of Machinists and Aerospace Workers, AFL-CIO, Silvergate District Lodge 50 ("Union"), claiming that he had been discharged in violation of the religious discrimination provisions of Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e-2(a) and 42 U.S.C. § 2000e(j)). He sought reinstatement of employment and benefits, an injunction restraining the Union from discriminating against him, back pay and allowances, reasonable attorney's fees, costs and interest. The district court held that no accommodation to Anderson's religious beliefs was possible because his offer to contribute the amount of Union dues to a charity of his choice, rather than to the Union or charities of

* Honorable Malcolm M. Lucas, United States District Judge, Central District of California, sitting by designation.

the Union's choice, imposed an undue hardship on the Union. *(Anderson v. General Dynamics Convair Aerospace Division* (C.D. Cal. 1977) 430 F. Supp. 418.)

The critical issue on appeal is whether the Union carried its burden of proving that it could not reasonably accommodate Anderson's religious convictions without undue hardship on the Union. We conclude that it did not carry its burden of proof.

Anderson was first employed by General Dynamics on October 11, 1956. In 1959, he became a member of the Seventh Day Adventist Church. A tenet of the Church is that its members should not belong to or contribute to labor organizations. Anderson has at all material times held a sincere belief in that tenet. From 1959 until April 3, 1972, the collective bargaining agreement between General Dynamics and the Union did not require General Dynamics to employ only / / persons who were union members. On April 3, 1972, however, the Union and General Dynamics entered into a collective bargaining agreement, which contained the following provision:

> "Any employee on the Company's active payroll who is in the bargaining unit and is not a member of the Union on 3 April, 1972, shall, as a condition of continued employment in the bargaining unit, join the Union within ten (10) days after the thirtieth (30th) day following the effective date of this agreement, and shall maintain his membership as provided in Paragraph A above."

Anderson did not join the Union within the time limitation provided by the security clause of the bargaining agreement. On May 25, 1972, the Union notified Anderson of his delinquency under the agreement. On June 12, 1972, Anderson informed General Dynamics, which, in turn, informed the Union, that his religious beliefs prohibited him from joining the Union. Two

days later, the Union requested that Anderson be discharged for failure to abide by the provisions of the security clause. On June 16, 1972, General Dynamics discharged Anderson from his employment for the sole reason that he refused to become a member of or contribute to the Union.

The parties stipulated that neither the Union nor General Dynamics offered Anderson any specific alternatives or accommodations with respect to joining the Union, and both the Union and General Dynamics told Anderson that he had to follow the collective bargaining and join the Union. The parties also stipulated that Anderson had made known to his fellow workers, including his shop committeemen, that he would not join the Union and that he would not contribute to the Union, unless he could insure that his contributions went to a recognized charity.

Anderson promptly filed a complaint with the Equal Employment Opportunity Commission, which deferred the matter to the California Fair Employment Practice Commission ("FEPC"). The FEPC referred the case back to the EEOC. After finding reasonable cause to believe that Anderson's discrimination charge was well-founded, the EEOC attempted conciliation. When conciliation failed, EEOC issued a right to sue letter on October 5, 1975. Anderson timely filed a complaint in the district court. The district court rendered judgment against him, and he appeals.

Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a) provides in pertinent part as follows:

> "It shall be an unlawful employment practice for an employer (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin. . . ."

Similar conduct by a labor organization is also proscribed by the Act. (42 U.S.C. § 2000e-2(c).)[1]

In 1972, Congress enacted 42 U.S.C. § 2000e(j), incorporating the substance of the 1967 EEOC guidelines (29 C.F.R. § 1605.1). The section provides:

> "The term 'religion' includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business."

As the Supreme Court has explained, in *Trans World Airlines, Inc. v. Hardison* (1977) 432 U.S. 63, 74:

"The intent and effect of this definition was to make it an unlawful employment practice under § 703(a)(1) for an employer [and also for a union] not to make reasonable accommodations, short of undue hardship, for the religious practices of his employees and prospective employees." Neither Congress nor the EEOC has attempted to spell out any precise guidelines for

[1] Section 2000e-2(c) provides as follows:

"It shall be an unlawful employment practice for a labor organization —

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;

(2) to limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section."

determining when the "reasonable accommodations" requirement has been met, nor the kinds of circumstances under which a particular accommodation may cause hardship that is "undue." These decisions must be made in the particular factual context of each case because the decision ultimately turns on the reasonableness of the conduct of the parties under the circumstances of each case. (*Redmond v. GAF Corp.* (7th Cir. 1978) 574 F.2d 897, 902-03; *Williams v. Southern Union Gas Co.* (10th Cir. 1976) 529 F.2d 483, 489. *Cf. Trans World Airlines, Inc. v. Hardison, supra,* 432 U.S. at 74-75.)

We, as well as other courts, have recognized that there is both tension and conflict between the legitimate interests of the Union in preserving the benefits of union security agreements, which are valid under the National Labor Relations Act (29 U.S.C. § 158), and the accommodation requirements of Title VII (*e.g., Yott v. North American Rockwell Corporation* (9th Cir. 1974) 501 F.2d 398; *McDaniel v. Essex Intern'l, Inc.* (6th Cir. 1978) 571 F.2d 338; *Cooper v. General Dynamics, Convair Aerospace Division* (5th Cir. 1976) 533 F.2d 163, 166-69). The balance has been struck, however, in favor of the elimination of discrimination in employment practices and requiring accommodation of religious practices, absent proof by the Union, the employer, or both, that reasonable accommodation cannot be made without an undue hardship to the Union or to the employer. (*Trans World Airlines, Inc. v. Hardison, supra,* 432 U.S 63; *McDonald v. Santa Fe Trail Transportation Co.* (1976) 427 U.S. 273; *Franks v. Bowman Transportation Co.* (1976) 424 U.S. 747.)

To establish a prima facie case of discrimination under §§ 2000e-2(a)(1) and (j) Anderson had the burden of pleading and proving that (1) he had a bona fide belief that union membership

and the payment of union dues are contrary to his religious faith;[2] (2) he informed his employer and the Union about his religious views that were in conflict with the Union security agreement; and (3) he was discharged for his refusal to join the Union and pay union dues. (*E.g., Yott v. North American Rockwell Corp., supra,* 501 F.2d 398; *Redmond v. GAF Corp., supra,* 574 F.2d at 901.)[3] Both by stipulations of fact and by evidence introduced at trial, Anderson established his prima facie case.

The burden was thereafter upon General Dynamics and the Union to prove that they made good faith efforts to accommodate Anderson's religious beliefs and, if those efforts were unsuccessful, to demonstrate that they were unable reasonably to accommodate his beliefs without undue hardship. *Id.* at 902.

Neither the Union nor General Dynamics did anything to accommodate Anderson's religious beliefs. They contend that their failure to take any steps to accommodate is excused because Anderson insisted on making an equivalent payment to a charity of his own choice, rather than paying the equivalent fund to the Union for charitable purposes. They rely heavily upon the district court's finding that Anderson's refusal to pay his charitable

[2] We have no occasion in this case to determine the breadth of the "beliefs" or "practices" protected by section 2000e(j) or to grapple with bona fides of a particular employee's religious convictions. Both of these facts are conceded for the purpose of this case. We are unaware, however, of the Supreme Court's admonition in Fowler v. Rhode Island (1953) 345 U.S. 67, 70 that "it is no business of courts to say . . . what is a religious practice or activity . . . " *See also* Redmond v. GAF Corp., *supra,* 574 F.2d at 900.

[3] We agree with the Seventh Circuit that the employee who has provided his employer with sufficient information to put it on notice of his religious needs is not required, as part of his prima facie case, to show that he thereafter made some efforts either to compromise or accommodate his own religious beliefs before he can seek an accommodation from his employer. (Redmond v. GAF Corp., *supra,* 574 F.2d at 901-02 ("While we feel plaintiff should be free, even encouraged, to suggest to his employer possible ways of accommodating his religious needs, we see nothing in the statute to support the position that this is part of plaintiff's burden of proof." *Id.* at 901.)

contribution to the Union was based on his general distrust of unions, rather than on religious beliefs. Finally, they argue that Anderson's suggestion of accommodation would work undue hardship as a matter of law because Anderson would become a "free rider."

The burden was upon the appellees, not Anderson, to undertake initial steps toward accommodation. They cannot excuse their failure to accommodate by pointing to deficiencies, if any there were, in Anderson's suggested accommodation. Thus, Anderson's motivation in selecting his own charity is irrelevant. Moreover, the district court's finding is contrary to the parties' stipulation of fact that teachings of Anderson's Church forbade making contributions to unions.

Appellees are left with the argument that Anderson's refusal to pay either his union dues or the equivalent of union dues to the Union for a charity of the Union's choice would be an undue hardship as a matter of law because the means of accommodation would create "free riders." The district court accepted this argument; we do not. We follow the Sixth Circuit in *McDaniel v. Essex International, Inc., supra,* 571 F.2d 338, with which our case is almost identical.

McDaniel was a Seventh Day Adventist who had a bona fide religious belief that membership in the union and the payment of union dues was a violatoin of her religion. She requested her employer and the union to make an accommodation to her religious beliefs, and she suggested that she would be willing to contribute an amount equal to the union dues to a non-sectarian charity to be chosen by the union and her employer. Neither responded to her request, and she was discharged for her failure to adhere to the requirements of the union security agreement.

The district court granted summary judgment in favor of the union and the employer, accepting their contentions that the accommodation that the employee suggested would work an undue hardship on the union as a matter of law because non-payment of union dues adversely affected the "financial core" of the union and thus impaired its ability to fulfill its collective bargaining functions. The *McDaniel* court reversed. The court pointed out that the union security provisions of the Taft-Hartley Act (29 U.S.C. § 158(a)(3), (b)(2) (1970)) "do not relieve an employer or a union of the duty of attempting to make reasonable accommodation to the individual religious needs of employees. [citations omitted]. The burden is on Essex and IAM to make an effort at accommodation and, if unsuccessful, to demonstrate that they were unable to reasonably accommodate the plaintiff's religious beliefs without undue hardship. The district court found that it would work an undue hardship on IAM to forego the dues payment by the plaintiff. There is no factual basis in the record for this conclusion. In *Draper v. U.S. Pipe & Foundry Co., supra,* [(6th Cir. 1976) 527 F.2d 515], this court expressed its skepticism concerning 'hypothetical hardships' based upon assumptions about accommodations which have never been put into practice. 527 F.2d at 520." (*Id.* at 343.)

Here, as in *McDaniel,* neither the Union nor the employer offered any evidence to prove that union members thought that a person was a free rider if he paid the equivalent of union dues to a charity, nor was there any evidence offered to prove as a fact that the accommodation of Anderson would otherwise have been an unduly difficult problem for the Union. It relied simply upon general sentiment against free riders.

Undue hardship means something greater than hardship.

Undue hardship cannot be proved by assumptions nor by opinions based on hypothetical facts. Even proof that employees would grumble about a particular accommodation is not enough to establish undue hardship. As the Supreme Court pointed out in *Franks v. Bowman, supra,* 424 U.S. at 775, *quoting United States v. Bethlehem Steel Corp.* (2d Cir. 1971) 446 F.2d 652, 663: "'If relief under Title VII can be denied merely because the majority group of employees, who have not suffered discrimination, will be unhappy about it, there will be little hope of correcting the wrongs to which the Act is directed.'"[4]

We conclude that the Union and General Dynamics failed to carry their burden of proof, and, accordingly, the judgment must be reversed.[5] We also conclude that Anderson is entitled to a reasonable attorney's fee as part of his costs, pursuant to 42 U.S.C. § 2000e-5(k), the amount of which shall be fixed by the district court on remand.

Reversed and remanded for further proceedings consistent with the views herein expressed.

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[4] Appelles can take no comfort from the observation in Yott v. North American Rockwell Corp., *supra,* 501 F.2d at 403: "If appelles are able to demonstrate that any suggested accommodation would impose undue hardship on the Union or the employer's business, then Yott's discrimination claim should fail." We reversed in *Yott* because the appellees had not demonstrated that the suggested accommodation would impose undue hardship, and, as we have explained, the appellees in this case have not done so either.

[5] The appellees attacked the constitutionality of the provisions of Title VII in issue in this case, and they renew that attack, at least obliquely, on appeal. The district court did not reach any constitutional issue, and under these circumstances we also decline to address any constitutional questions.

The bill was ordered to be engrossed and read a third time, was read the third time and passed, and a motion to reconsider was laid on the table.

GENERAL LEAVE

Mr. MURPHY of New York. Mr. Speaker, I ask unanimous consent that all Members may have 5 legislative days in which to revise and extend their remarks on the bill just passed, H.R. 9794.

The SPEAKER pro tempore. Is there objection to the request of the gentleman from New York?

There was no objection.

THE ENVIRONMENTAL IMPACT OF PRESIDENT CARTER'S ENERGY PROPOSALS

(Mr. BROWN of California asked and was given permission to address the House for 1 minute and to revise and extend his remarks.)

Mr. BROWN of California. Mr. Speaker, in recent months I have been concerned about the environmental impact of President Carter's energy proposals. As chairman of the House Science and Technology Subcommittee on Environment and the Atmosphere, I have held hearings on environmental problems and the new energy plan, focusing on both the coal and nuclear fuel cycles.

In addition, I have asked the Congressional Research Service to analyze the degree to which energy-related Federal research and development is meeting our needs under President Carter's energy plan.

My main interest has been with the increased use of coal and resultant environmental effects of large quantities of nitrogen oxides and sulfur oxides emitted into the air.

It seems clear, as a result of all of our investigations, that we may have had a mismatch in our environmental funding areas. We appear to have been funding projects in problem areas where there is little perceived concern.

In the coming year, the Environment and Atmosphere Subcommittee will be examining this problem and will make recommendations for better utilization of our Federal environmental monitoring program. Without an adequately funded and coordinated monitoring program, we never will be satisfied that our pollution control efforts are properly directed.

I welcome your input in this area and commend to you the report our subcommittee issued this week, "Environmental Challenges of the President's Energy Plan: Implications for Research and Development."

ANNOUNCEMENT BY THE SPEAKER PRO TEMPORE

The SPEAKER pro tempore. Pursuant to the provisions of clause 3(b) of rule XXVII, the Chair announces that he will postpone further proceedings today on each motion to suspend the rules on which a recorded vote or the yeas and nays are ordered, or on which the vote is objected to under clause 4 of rule XV.

After all motions to suspend the rules have been entertained and debated and after those motions to be determined by "nonrecord" votes have been disposed of, the Chair will then put the question on each motion on which the further proceedings were postponed.

CONSCIENTIOUS OBJECTION TO JOINING A LABOR ORGANIZATION

Mr. THOMPSON. Mr. Speaker, I move to suspend the rules and pass the bill (H.R. 3384) to amend the National Labor Relations Act to provide that any employee who is a member of a religion or sect historically holding conscientious objection to joining or financially supporting a labor organization shall not be required to do so.

The Clerk read as follows:

H.R. 3384

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 19 of the National Labor Relations Act is amended as follows: (a) by striking out the words "of a health care institution" after the words "Any employee"; and (b) by adding a new sentence at the end thereof: "Proof of such payments must be made on a monthly basis as a condition of continued exemption from the requirement of financial support to the labor organization, subject to such rules and regulations as the Board may prescribe.".

The SPEAKER pro tempore. Is a second demanded?

Mr. ERLENBORN. Mr. Speaker, I demand a second.

The SPEAKER pro tempore. Without objection, a second will be considered as ordered.

There was no objection

The SPEAKER pro tempore. The gentleman from New Jersey (Mr. THOMPSON) will be recognized for 20 minutes, and the gentleman from Illinois (Mr. ERLENBORN) will be recognized for 20 minutes.

The Chair recognizes the gentleman from New Jersey (Mr. THOMPSON).

Mr. THOMPSON. Mr. Speaker, I yield myself 5 minutes.

(Mr. THOMPSON asked and was given permission to revise and extend his remarks.)

Mr. THOMPSON. Mr. Speaker, H.R. 3384 reflects an accommodation between basic rights created by the National Labor Relations Act and certain religious beliefs which prohibit membership in a union. It extends an exception that was made for employees in the health care industry to all employees who are covered by the National Labor Relations Act.

The National Labor Relations Act is based on the concept of majority rule. The union designated or selected for the purposes of collective bargaining "by a majority of the employees in a unit appropriate for such purposes" is the exclusive bargaining agent for all employees in the bargaining unit; and remains such unless and until it is voted out by a majority of the employees in a secret-ballot election called expressly for that purpose.

An obligation of fair representation accompanies the right of exclusive representation, and the union selected by the majority must represent all employees in the bargaining unit fairly and without hostile discrimination; whether or not the employee is a union member, whether or not the employee pays union dues.

To minimize the problem of the "free rider," that is the employee who would enjoy union representation without paying his fair share of the costs, section 8(a)(3) permits but does not require the employer and the union to agree that all employees must pay fair and reasonable union dues as a condition of continued employment.

This statutory framework, generally fair, has created a conflict between the dues-paying union member on the one hand, and employees who object to the payment of dues, because of religious beliefs.

H.R. 3384 seeks to accommodate these various interests and concerns.

H.R. 3384 extends and expands section 19 of the National Labor Relations Act, now limited to the health care industry. The amendment would apply to any person who can produce adequate verification of membership in a bona fide religion which historically has held conscientious objection to joining or financially supporting a labor organization. It would permit such a person to refrain from joining or financially supporting the labor organization on the condition that instead, the person would be required to pay in lieu of periodic dues and initiation fees an equivalent sum to a nonreligious charitable fund. Proof of such payments would be required on a monthly basis as a condition of continued exemption.

Members of the Seventh-day Adventist Church, for example, cannot, consistent with the traditional and historic teachings of that church, pay dues to unions. Other churches share the same traditional belief of prohibiting cooperation with the union selected by majority vote to represent their interests.

The bill would accommodate the religious beliefs of these persons and thereby reconcile the National Labor Relations Act with section 701(j) of the Equal Employment Opportunity Act as recently construed in *Cooper* v. *General Dynamics*, 533 F.2d 163, Fifth Circuit decided June 9, 1976. Thus, the bill reflects the legislative determination that the alternative to the payment of union dues provided in the bill—

> Reasonably accommodate /s/ . . . an employee . . . religious observance or practice without undue hardship.

Title VII, section 701(j), 43 United States Code, section 2000e(j). The option of allowing a qualifying individual the ability to pay the equivalent of dues to a nonreligious charity clearly constitutes a "reasonable accommodation" to the individual's religious beliefs.

The bill has widespread support and virtually no opposition. The labor movement has recognized that this bill represents a fair and just accommodation. Those who represent the members of the religious groups that are potentially affected by this bill are strongly suppor-

tive of the measure. And, of course, the bill was supported unanimously by the Education and Labor Committee. It is clear that H.R. 3384 deserves the overwhelming support of this body and I urge its passage.

Mr. DUNCAN of Oregon. Mr. Speaker, will the gentleman yield?

Mr. THOMPSON. I yield to the gentleman from Oregon.

Mr. DUNCAN of Oregon. Mr. Speaker, I congratulate the chairman, the gentleman from New Jersey (Mr. THOMPSON), the gentleman from Illinois (Mr. ERLENBORN), and the gentleman from California (Mr. DON H. CLAUSEN) for demonstrating this morning that what appeared to be irreconcilable differences can be reconciled by men of good will. I think the labor movement pointed us in this direction because they have for years approved on an ad hoc basis this solution to a difficult problem.

Finally I would like to call to the attention of this body the work my distinguished predecessor, Mrs. Edith Green, performed in this field in the 1960's when she was pointing in this direction. She should take great satisfaction that her objective has finally been accomplished.

Mr. THOMPSON. I hope the gentlewoman, our former distinguished colleague, is aware of this action. I certainly respected her attempt at that time. As a matter of historical fact, the former attempt to amend the act in this manner was not objected to by me on any ground of principle. It was objected to on the ground that it was not germane to the pending legislation.

Mr. DUNCAN of Oregon. If the gentleman will yield further, I would just like to say that the gentleman's contribution to this solution to the problem has been a very substantial one. He deserves a great deal of credit from those members of the religious organizations affected.

Mr. THOMPSON. I thank the gentleman from Oregon.

Mr. FOLEY. Mr. Speaker, will the gentleman yield?

Mr. THOMPSON. I yield to the gentleman from Washington.

Mr. FOLEY. Mr. Speaker, I join the others in complimenting the distinguished gentleman from New Jersey, the chairman of the subcommittee that reported this legislation and all the Members on both sides of the aisle that reported it. It was unanimously reported from the Committee on Education and Labor, as the gentleman says. It is a measure that deserves the unanimous support of this House.

Mr. THOMPSON. Mr. Speaker, I thank the gentleman from Washington.

I might also add to the list of the gentleman from Oregon, our distinguished colleague, the gentlewoman from California (Mrs. PETTIS), who has been very active and interested in the outcome of this measure.

Mr. AUCOIN. Mr. Speaker, will the gentleman yield?

Mr. THOMPSON. I yield to the gentleman from Oregon.

(Mr. AUCOIN asked and was given permission to revise and extend his remarks.)

Mr. AUCOIN. Mr. Speaker, I rise today to associate myself with the aim of H.R. 3384 and the concept of the "conscience clause."

While I was a member of the Oregon Legislature, I cast a vote in favor of a similar provision in State law and it is a pleasure to do so again, this time in Congress.

Working men and women should not have to choose between a job or their religion. Such a choice abridges the freedom of religion, one of the many basic rights we cherish and defend in this great Nation of ours.

It is a compliment to the gentleman from New Jersey, Mr. THOMPSON, and to the gentleman from Illinois, Mr. ERLENBORN, that this bill has been brought to the House floor expeditiously and with bipartisan support following the consideration of H.R. 8410, the National Labor Relations Act.

I also believe organized labor, and specifically the AFL–CIO, has shown wisdom in acknowledging the precedence of a conscience objection against joining a labor organization. Labor's accommodating position, which still preserves the integrity of the basic bargaining unit, is truly commendable.

Mrs. LLOYD of Tennessee. Mr. Speaker, will the gentleman yield?

Mr. THOMPSON. I yield to the distinguished gentlewoman from Tennessee.

(Mrs. LLOYD of Tennessee asked and was given permission to revise and extend her remarks.)

Mrs. LLOYD of Tennessee. Mr. Speaker, I, too, would like to compliment the distinguished chairman of this committee and others who have worked to bring this bill to the floor. I ask everyone to unanimously support it.

Mr. PERKINS. Mr. Speaker, I would like to commend my good friend, the gentleman from New Jersey, the chairman of the Subcommittee on Labor-Management Relations, for bringing the bill H.R. 3384 to the floor of the House. It is an appropriate and desirable amendment to our Nation's labor laws.

The bill is designed to accommodate the religious beliefs of those who conscientiously object to joining or financially supporting a labor organization. It is designed to protect the interests of those belonging to a religious organization or sect which historically holds such beliefs.

Under the National Labor Relations Act, where a union has been designated as the bargaining representative for a group of employees, it is the exclusive bargaining agent for all employees and has an obligation to represent all employees in the bargaining unit fairly and without discrimination. This is true whether or not the employee is a union member and whether or not the employee pays union dues.

Section 8(a)(3) of the act currently permits, but does not require, the employer and the union to enter into an agreement under which all employees must pay fair and reasonable union dues as a condition of continued employment. This statutory provision has generally worked and has generally been considered fair. It was designed to deal with the so-called "free rider"—the worker who would enjoy union representation without paying a fair share of the cost.

The current law, however, does not adequately meet the problem of the employee who objects to the payment of dues because of religious beliefs. The bill before us today, H.R. 3384, permits such a person to refrain from joining or supporting a labor organization on the condition that that person pay, in lieu of periodic dues and initiation fees, an equivalent sum to a nonreligious charitable fund. This option of allowing a qualified person to pay an equivalent sum in lieu of periodic dues and initiation fees constitutes a reasonable and fair accommodation to individually held religious beliefs.

I urge my colleagues to support this bill.

Mr. ERLENBORN. Mr. Speaker, I yield myself 5 minutes.

(Mr. ERLENBORN asked and was given permission to revise and extend his remarks.)

Mr. ERLENBORN. Mr. Speaker, I rise in heartfelt supoprt of this bill (H.R. 3384) and to express my sincere appreciation to the gentleman from New Jersey (Mr. THOMPSON), the chairman of the Labor-Management Relations Subcommittee, for taking this step to fulfill his oft-stated pledge to preserve the religious liberty of even the smallest groups which strictly adhere to matters of conscience.

H.R. 3384 amends section 19—which, I am proud to say, I authored in 1974—of the National Labor Relations Act by providing that all employees—not just employees of health care institutions—who are members of and adhere to teachings of a bona fide religion which has historically held conscientious objections to joining or financially supporting unions will not be required to do so, but may be required to contribute the equivalent in dues and fees to a nonreligious charity. Under H.R. 3384, prof of such payments must also be made.

The drive to enact this type of legislation began more than a decade ago, in 1965, when our esteemed former colleague, Edith Green, offered such an amendment to a bill to repeal section 14(b). Although her efforts were then ruled nongermane to the bill before the House, she and another former Congressman, Floyd Hicks of Washington, continued to press for this legislation throughout their congressional careers.

That drive—crusade, if you will—has been continued by others including myself, Chairman THOMPSON, Mr. DON H. CLAUSEN, Mrs. PETTIS, Mr. DUNCAN of Oregon, and Mr. STUMP, to name a few. H.R. 3384 is the result of these persistent efforts.

I know of no opposition to this bill. It has the acceptance of organized labor and management alike. Organized labor expressed its concern in 1965, when the AFL–CIO's executive council declared "it to be the policy of the AFL–CIO that unions should accommodate themselves to genuine individual religious scruples,"

and urged affiliated national and international unions to "adopt procedures for respecting sincere personal convictions as to union membership or activities" and "to undertake to insure that this policy is fully and sympathetically implemented by all local unions."

That position was reinforced a few weeks ago by George Meany, the president of the AFL–CIO, while testifying before the Subcommittee on Labor-Management Relations on H.R. 8410, the proposed Labor Law Reform Act. Mr. Meany stated:

Our position on that I think has been clear for years, and I think it is a fair position on the people who have conscientious objections to joining unions. We think they should participate, that they are the beneficiareis of good contracts where we get good contracts. At the same time we want to recognize their obligations to their particular religion. So we say in effect that they should make a contribution not to us but to some charitable (organization) . . .

In view of our constitutional heritage, one may ask why such an amendment to the NLRA is necessary: Does not the Constitution protect our freedom of religion?

My answer is that yes, it does, but that the developing law has been interpreted to erode that freedom in a manner unforeseen by protectors of that freedom. Just questioning whether the exercise or practice of religious conscience may be denied under our national labor law is sufficient reason to set the record straight and amend our law to be compatible with our first amendment rights.

Specifically, amendment I of the Constitution reads:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or the press; or the right of the people peacably to assemble, and to petition the Government for a redress of grievances.

H.R. 3384 simply removes any question as to whether the first phrase of the first amendment has any meaning under our national labor law.

This bill is necessary to resolve any ambiguity between constitutional rights and union security provisions of our labor laws. In 1947, Congress passed the National Labor Relations Act, which contained in section 8(a)(3) a provision for union security—that provision is similar in content to the subsequently enacted section 2 eleventh of the Railway Labor Act, which represented a change in the direction of railroad industry bargaining away from consistently advocating "freedom of choice." Section 8(a)(3) of the NLRA allows a labor organization and an employer to enter into a collective bargaining agreement requiring, as a condition of continued employment, membership in the labor organization after 30 days, although "membership" has been since defined as the payment of dues and fees, uniformly required.

It is clear that the proviso to section 8(a)(3) was enacted to require the "free rider"—to pay his or her proportionate share of the cost of the benefits provided by collective bargaining. There was to be a sharing of the burden of maintenance by all of the beneficiaries of union activity. Protections were offered to safeguard the rights of dissenters in that their employment relationship could not be interfered with, except for their failure to tender the periodic dues and fees uniformly required.

Despite that attempt to protect dissenters, there were, unfortunately, no protections offered to a relatively unknown minority—and a very small minority at that. That is the minority of those who hold religious beliefs against joining or financially supporting labor organizations or similar organizations. To my knowledge there are seven such religious groups, including Plymouth Brethern IV and Mennonites. Probably the largest such religion is the Seventh-Day Adventist Church which has about 500,000 members. Others are the Amish, the National Association of Evangelicals, the Christian Missionary Alliance, and the Old German Baptists.

Those with such religious convictions are entitled to the exercise of those convictions. They should not have to choose between their religion and their jobs. Yet they often must. Let me list a few cases:

CURRENT SEVENTH-DAY ADVENTIST CASES REGARDING LABOR UNION MEMBERSHIP AGAINST RELIGIOUS CONVICTIONS

[A partial listing]

DARRELL NOTTELSON

After studying the counsel from the church more fully in 1974, Mr. Darrell C. Nottelson of Menomonee Falls, Wisconsin, an employee of the A. O. Smith Corporation of Milwaukee, requested of the Smith Steel Workers Directly Affiliated Labor Union, 19806 AFL–CIO, to accommodate his religious beliefs by allowing him to contribute an amount equal to his union dues (about $6 a month) to a nonunion, nonreligious charity and to discontinue his membership in the union. Mr. Nottelson received unemployment compensation for a time but when it was contested by the A. O. Smith Corporation a hearing officer reversed his eligibility to receive unemployment compensation when Mr. Nottelson was billed for the $1,600 he had received. Mr. Nottelson lost his full retirement benefits which he would have been eligible for had he worked another two years. He was unable to find employment as a welder because of the high percentage of union shops in his profession. Mr. Nottelson's EEOC complaint served as the basis for a law suit which was heard September 2, 1977 before Judge Robert Warren, the United States District judge, Eastern District, Wisconsin.

WILMA HAYNES

Mrs. Haynes worked as a secretary at the Dallas & Mavis Forwarding Company in South Bend, Indiana, a nonunion employer. Following a successful certification effort by the Teamsters, the union negotiated a contract with the company containing a union security clause. All employees were required to join the union. Because of her religious beliefs Mrs. Haynes could not do this. On September 27, 1974 she authorized her dues to be withheld by the company and paid to a charity. The Teamsters turned down this arrangement. On November 8, 1974 she was dismissed. During the time Mrs. Haynes was under extremely high pressure prior to her dismissal she suffered heart irregularities that she felt and her physician felt was directly related to her emotional stress over her impending termination. The same Teamsters Local had previously allowed Mr. Jon Lamon, an employee of the Southern Michigan Cold Storage Company in South Bend to be exempt from the union security provisions of a contract they had just won. However, the Teamsters were unwilling to do it for Mrs. Haynes and insisted that she be dismissed.

BERNADINE BALD

After becoming convinced that she could no longer be a member of the Teamsters Local 959 in Anchorage, Alaska, Mrs. Bald, an employee of the RCA Alaska Communications, Inc., resigned from the union on September 1, 1974 and requested the option of paying her dues to a neutral charity. The union refused and Mrs. Bald was terminated in December of 1974. Her case is presently pending before the Supreme Court of the State of Alaska.

DORIS M'DANIEL

After starting work for the Essex Wire Company in Berrien Springs, Michigan, Mrs. McDaniel discovered that there was no accommodation for religious beliefs by the company or the International Association of Machinists when individuals held religious beliefs against joining or financially supporting a labor union. She was discharged on December 28, 1972. She instigated a charge of discrimination with the Equal Employment Opportunity Commission. Action was subsequently entered in the court of the Western District of Michigan in response to a motion to dismiss filed by the International Association of Machinists, Judge Fox dismissed the case on January 13, 1976. The case is presently on appeal before the Sixth Circuit Court of Appeals.

DUANE TERRELL BURNS

In 1970 Mr. Burns joined the Seventh-day Adventist Church. As he came to understand the teachings of the church and his relationship with other people and organizations, he determined that he could no longer remain a member of the United Transportation Union and resigned from the union on February 26, 1974. When the union declined to make an accommodation based on an alternate payment of dues to a charitable organization, Mr. Burns filed a complaint with the Equal Employment Opportunity Commission and filed suit in court on March 1, 1974. Mr. Burns has appealed his case from an unfavorable ruling of the district court of Arizona to the Ninth Circuit Court of Appeals where the case is now pending.

DAVID ANDERSON

In 1972 Mr. Anderson was fired by the General Dynamics Company in San Diego after he withdrew from the International Association of Machinists. He offered to pay the equivalent of dues to a neutral charity but his offer was declined. He was dismissed after having worked at the General Dynamics Plant following the successful efforts of the union to obtain a union security contract. Thus his dismissal came about by conditions beyond his control. Mr. Anderson lost the case in the Southern District of California and has appealed it to the Ninth Circuit Court of Appeals where the case is now pending.

CLARITA MICHAUD

Mrs. Michaud worked for the Oxford Paper Company which was sold in about April of 1976 to the Boise-Cascade Company. Thereafter she was confronted with a union security contract between the United Paper Workers of America and the company. She offered to pay the equivalent of dues to a charity but the union steadfastly refused. When it was evident that the matter would be the subject of litigation the union agreed to have a neutral escrow fund established to be certain that her dues were paid the same as other workers. Her case was lost in the Superior Court of Maine (Oxford County) and is presently on appeal to the Su-

preme Judicial Court of the State of Maine. She is continuing to work pending the outcome of the litigation.

ROBERT A. WONDZELL

Mr. Wondzell had been a member of the Lumber Production and Industrial Workers Union Local 2362 for about nine years while he was employed by the Alaska Wood Products Company in Wrangell, Alaska. During this time he became a member of the Seventh-day Adventist Church. Several years later he came under conviction that he should withdraw from the union and requested that he be accommodated by being allowed to pay his dues to a neutral charity. The union refused and the company discharged him on May 7, 1975. After filing charges of discrimination before the state and federal civil rights agencies he was issued a Right-to-Sue letter and entered action in the superior court for the State of Alaska. On October 15, 1975 the Judge found against him. His case is now on appeal to the Supreme Court of the State of Alaska.

HOWARD COOPER, RITA KIMBELL, AND HOWARD HOPKINS

These three Seventh-day Adventist Church members worked at the General Dynamics plant in Fort Worth. For a number of years there was no compulsory union membership requirement because Texas is a Right-to-Work state. However, the International Association of Machinists entered into a union security agreement with General Dynamics and petitioned for the discharge of the employees when they refused to join or support the labor union. The case went to the U.S. District Court for the Northern District of Texas where the three Seventh-day Adventist members lost. The case was appealed to the Fifth Circuit Court of Appeals where on June 9, 1976 the Court reversed the lower court's decision and remanded the case to the district court to determine accommodation on the facts of the case. The International Association of Machinists and General Dynamics appealed the decision to the U.S. Supreme Court. Without hearing the case the Supreme Court remanded the case during the summer of 1977 to the district court for determination of accommodation in harmony with its Title VII decisions. The case is now back in the district court for a hearing on the merits.

Religious liberty has always been, and should continue to be, a matter of the highest priority. Many Federal laws have provided special treatment because of personal religious belief. These include:

First. The Postal Reorganization Act of 1970;

Second. The Military Selective Service Act;

Third. The Immigration and Nationality Act;

Fourth. The Social Security Act;

Fifth. The Federal Aviation Act;

Sixth. The Civil Rights Act of 1964—title VII; 1968—housing; and 1972;

Seventh. The Jury Selection and Service Act;

Eighth. The Public Health Service Act Amendments of 1973; and

Ninth. The 1974 "health care" amendments to the National Labor Relations Act.

Some feel that the religious accommodation represented by this bill does not rise to the status of a first amendment issue. By recognizing that this bill accommodates the religious beliefs of those small sects I have mentioned, and thereby reconciling the National Labor Relations Act with the Equal Employment Opportunity Act, I believe that the first amendment constitutional rights are fully protected, for that is what the EEOA sought to accomplish. Certainly this bill accepts the principle of religious liberty as guaranteed by our Constitution, and implemented by the Equal Employment Opportunity Act; and it is clear the bill prefers that principle over any conflict with it raised by our national labor policy.

Enactment of this legislation will demonstrate the Federal Government's abiding concern for the preservation of religious liberty to all those who strictly adhere to the teachings of their religion, regardless of how small their numbers.

I urge my colleagues to support this bill.

Mr. Speaker, I yield to the gentleman from Alabama (Mr. EDWARDS).

Mr. EDWARDS of Alabama. Mr. Speaker, I thank the gentleman for yielding.

I have a question. The committee report refers to section 8(a)(3), which permits, but does not require, the employer and the union to agree that all employees must pay fair and reasonable union dues as a condition of continued employment.

I suspect that is with respect to an agency shop, where it is agreed to by both the union and the employers.

Mr. ERLENBORN. Yes, that is correct.

Mr. EDWARDS of Alabama. Mr. Speaker, if the gentleman will yield further, the bill in question amends section 19. Does this put a conscientious objector in any different position than the employee who does not care to join a union and who works for a company where there is no agreement between the union and the employer under section 8(a)(3)?

Mr. ERLENBORN. If I understand the gentleman's question, the only case where the acts we are considering would be necessary is where there is an agency shop agreement and the employee who belongs to one of these religions is then faced with making a choice between his job or his religion.

The SPEAKER pro tempore. The time of the gentleman from Illinois has expired.

Mr. ERLENBORN. Mr. Speaker, I yield myself 1 additional minute.

Mr. Speaker, if there is no agency shop agreement, there would be no necessity for the application of this act, because the employee would not be required to pay dues or join the union.

Mr. EDWARDS of Alabama. Will the gentleman yield further?

Mr. ERLENBORN. I will be happy to.

Mr. EDWARDS of Alabama. So that under section 8(a)(3), if the employer and employee had not bargained and agreed there would be an agency shop, then, a conscientious objector would not be required to pay anything to an organization under the present bill?

Mr. ERLENBORN. The gentleman, in my opinion, is correct. I think there are two situations: the union shop and the agency shop. The union shop, where the employee might be forced to join the union; the agency shop, where, although he is not forced to join the union, he is forced to pay initiation fees and dues to the union.

In both of those stiuations, this act would apply for the conscientious objector who belongs to a religion which prohibits him as a matter of conscience from doing so. He would, if it is so agreed between the union and employer, be required to pay the equivalent amount to a charity not connected either with the union or with his religion.

The SPEAKER pro tempore. The time of the gentleman from Illinois has again expired.

Mr. ERLENBORN. Mr. Speaker, I yield myself 1 additional minute.

I would ask the gentleman from New Jersey if he does not agree with the interpretation as revealed by the colloquy between myself and the gentleman from Alabama.

If I might just restate the question very succinctly, the only time this law would be necessary is if there is either a union shop or an agency shop agreement in effect. If there is a union that has been certified and is acting as the bargaining agent, but there is neither an agency shop or a union shop agreement between that union and the employer, the problem does not arise and the employee is not faced with the necessity of either joining or paying dues.

Mr. THOMPSON. The gentleman is quite correct.

Mr. ERLENBORN. I thank the gentleman.

Mr. Speaker, I yield 5 minutes to the gentleman from California (Mr. DON H. CLAUSEN).

(Mr. DON H. CLAUSEN asked and was given permission to revise and extend his remarks.)

Mr. DON H. CLAUSEN. Mr. Speaker, it gives me great pleasure to see the House of Representatives ready to affirm today one of our basic constitutional principles—the first amendment guarantee of free exercise of religion.

The concepts behind the religious freedom amendment have come to fruition because of the cooperation, commitment and resolute efforts in the Labor Management Subcommittee of the gentleman from New Jersey (Mr. THOMPSON), the gentleman from Illinois (Mr. ERLENBORN), the gentlewoman from California (Mrs. PETTIS) and the gentleman from Oregon (Mr. DUNCAN) and Mr. AuCOIN, Mrs. LLOYD of Tennessee and Mr. STUMP of Arizona—all have made significant contributions to insuring that we will have true religious liberty in our Nation's labor law. We have been working for 13 years on an effort initiated by our respected former colleague from Oregon (Mrs. GREEN).

They have demonstrated that they are champions of religious freedom and it has been my privilege and pleasure to coordinate this legislative effort with my good friends and colleagues in the House and with the religious groups directly affected by this legislation.

H.R. 3384 the "religious freedom amendment," would provide that any employee who is a member of a religion or sect historically holding conscientious objection to joining or financially supporting a labor organization, would not

be required to do so. In effect, it would protect the rights of conscience of thousands of sincere people who believe it to be a violation of Biblical principles to join or financially support a labor union.

In the past we have passed legislation to protect the free exercise of religion. For instance, consider our laws providing for religious dissenters to military service, for religious dissenters to the social security program and for health-care workers. The religious freedom amendment will simply follow this precedent by permitting certain, relatively small, religious groups to freely exercise their religious beliefs without losing their jobs if they work under labor-management contracts with union security clauses. These religious bodies include the Amish, some of the Mennonite groups, the Old German Baptists, and Plymouth Brethren No. 4, and the Seventh-Day Adventists.

In seeking the exemption from union shop agreements these people cannot be called "free-riders" for, in fact, they are in complete agreement with the provisions in this measure which provide that the full amount of union initiation and the full amount of union dues will be paid to a charity that is mutually acceptable to both the union and the people who, as a matter of conscience, cannot join the union.

Some may wonder why this legislation is necessary. Let me explain it this way.

Religious dissenters to membership in or financial support of labor organizations have had difficulties ever since the National Labor Relations Act required them to either join or financially support a labor organization. During the 1940's and 1950's individuals and at least one of the churches tried to make voluntary arrangements with labor organizations, but often the arrangements did not work satisfactorily.

Through the last few years several religious dissenters on this issue have sought protection through section 701 (j) of title VII of the Civil Rights Act of 1965. Their efforts in the courts to determine whether such accommodations are reasonable and do not cause undue hardship to the employer or the labor organization have met with mixed results. The Court of Appeals in the Fifth Circuit has ruled that a labor organization and an employer must try to accommodate. That case involved three employees with 20 or more years' work experience. However, in California, my home State, a Federal district court has upheld the firing of a worker with 22 years of experience who refused to either join or financially support a labor organization.

In Wisconsin, another worker was fired after nearly 30 years at the job, again over the conflict between his religious beliefs and a union-security clause. His case is now before a Federal district court. Thus some courts are extending title VII protection to these religious dissenters and others are not. It is up to us here in the Congress to show our intent that these people should be allowed to exercise their religious beliefs.

In 1974, when we amended the National Labor Relations Act to allow unionization of private health care institutions, we added a section 19 to the act which gave "conscience clause" coverage to these specific workers. The bill before us, H.R. 3384, the religious freedom amendment, amends section 19 so that it will cover all workers covered by the National Labor Relations Act.

This measure has received strong support from both sides of the aisle and from labor and management alike. In fact, George Meany, president of the AFL–CIO, while testifying before the Subcommittee on Labor-Management Relations on another House bill said the following about our amendment concept:

"Our position on that, I think, has been clear for years, and I think it is a fair position on the people who have conscientious objections to joining unions. We think they should participate, that they are the beneficiaries of good contracts where we get good contracts. At the same time we want to recognize their obligations to their particular religion. So we say, in effect, that they should make a contribution, not to us, but some charitable (organization). . . .

Our hearts and our minds tell us this is a bill that merits our approval. In the true spirit of the first amendment free-exercise of religion clause of our Constitution, I urge my colleagues to join me in supporting H.R. 3384.

In my judgment, the greatest contribution to the social progress of mankind anywhere on Earth, has come as a result of the established guidelines in our Constitution. Of all the Constitutional amendments, I personally believe that first amendment has been the most constructive and protective of our basic and cherished freedoms. This measure is, in fact, simply a restoration to our Federal labor laws of the full constitutional guarantee of freedom of religion to practice religion.

The legislative effects of this measure go beyond permitting the free exercise of an individual's religious conscience in his employment. It is a reaffirmation by the Congress that we will take whatever steps are required to insure in every way the right of each American to worship his God in his own way. And, further, that no action by Government—directly or indirectly—will be allowed which would limit this right.

We do not need to share this viewpoint, indeed we do not even need to understand it to stand emphatically in support of these individuals' conscientious convictions.

Religious liberty does not mean, after all, simply to respect a man's religion. It means to protect his right to practice a religion we may not respect. Let us be remembered as statesmen who recognized this fact and who acted resolutely and intelligently in their defense of and for the cause of religious freedom in America.

Mr. THOMPSON. Mr. Speaker, will the gentleman yield?

Mr. DON H. CLAUSEN. I yield to the gentleman from New Jersey.

Mr. THOMPSON. I think also that the late and distinguished former Senator from Oregon, Wayne Morse, should be recognized at this time for his efforts over a long period of time to achieve the result which we hope is achieved today. Senator Morse was very deeply and vitally interested, and communicated with me on innumerable occasions on behalf of this legislation.

Mr. DON H. CLAUSEN. I am glad the gentleman made that observation.

Mr. DUNCAN of Oregon. Mr. Speaker, will the gentleman yield?

Mr. DON H. CLAUSEN. I yield to the gentleman from Oregon.

Mr. DUNCAN of Oregon. I feel remiss, and I want to thank the gentleman from New Jersey, for mentioning the fact of Senator Morse's participation. There was no one who spoke out more clearly or more loudly or at such length on behalf of the rights, not only of organized labor, but of the rights of people in religious minorities.

Mr. DON H. CLAUSEN. Mr. Speaker, I appreciate the comments of the gentleman from Oregon.

Mr. THOMPSON. Mr. Speaker, I have no further requests for time.

Mr. ERLENBORN. Mr. Speaker, I yield 5 minutes to the gentlewoman from California (Mrs. PETTIS).

(Mrs. PETTIS asked and was given permission to revise and extend her remarks.)

Mrs. PETTIS. Mr. Speaker, I rise today in wholehearted support of H.R. 3384, the religious freedom amendment to the National Labor Relations Act. I should add that I am a cosponsor of an identical bill—H.R. 9368.

My sincere appreciation goes out to our distinguished colleague, the gentleman from New Jersey (Mr. THOMPSON), the chairman of the Subcommittee on Labor-Management Relations, who has been instrumental in getting this bill reported to the floor.

I also would like to credit our colleagues: Mr. DON CLAUSEN and Mr. JOHN ERLENBORN for their continued and enthusiastic support of this legislation.

Mr. Speaker, unlike many of us here today, I am not an attorney and neither am I an expert on constitutional law.

However, like every citizen of these United States, I hold dear the cherished words of the first amendment to the Constitution which guarantee us all the right to follow our respective religious faiths.

But I fear that many of my colleagues may not be aware that thousands of Americans whose religious beliefs prohibit them from joining labor organizations have had to choose between retaining their jobs or violating their religious consciences.

Sadly, many of sincere religious conviction have wound up on unemployment rolls because of their strong religious beliefs.

I am aware of at least 32 men and women in my congressional district who, during the past several years, have either lost or have been refused employment because of religious beliefs which prohibit them from financially supporting a labor organization.

As many of you may know, I am a Seventh-Day Adventist and the tenets of

my church strictly prohibit union membership.

This problem is not only encountered by Seventh-Day Adventists, however, but it affects other religious bodies as well.

I should stress that it is not our desire to create a special class of religious "free riders" who will take advantage of benefits negotiated by labor or professional organizations without contributing to the support of these groups.

H.R. 3384 remedies this problem by requiring that employees whose sincere religious beliefs prohibit the monetary support of labor organizations be permitted to contribute to nonreligious charitable funds in place of periodic labor organization dues or initiation fees.

I would remind my colleagues that during testimony before the Subcommittee on Labor-Managment Relations in September, George Meany, the President of the AFL–CIO, endorsed this concept and that the 1965 AFL–CIO policy statement supports the "conscience clause" which is part and parcel of H.R. 3384.

However, I am sorry to report that not all member unions of the AFL–CIO have instituted a clear, consistent policy to accommodate those who may not join a labor union due to religious dissent.

H.R. 3384 would simply bring all labor organizations in line with AFL–CIO policy on this question. It is not an anti-labor measure by any means. It is, rather, an attempt to preserve the religious liberties which were guaranteed by our forefathers.

In debating this issue, it occurs to me that while the first amendment is intended to grant up the right of freedom of religion, economic conditions today are such that one can ill afford to give up his job to satisfy his religious conscience.

Yet, many have been forced to do just this and, therefore, the essence of the first amendment has been violated.

I ask my colleagues to vote in favor of H.R. 3384 and bring the protection of the first amendment to all our citizens who are covered by the National Labor Relations Act.

A nation such as ours that speaks out to the world on the question of human rights can ill afford to bring hardship and misery upon some of its working men and women because of their sincerely held religious beliefs.

Mr. THOMPSON. Mr. Speaker, I yield myself 1 minute.

Mr. Speaker, I would like to commend the Public Affairs and Religious Liberties Department of the Conference of Seventh-day Adventists and, particularly, Mr. Melvin Adams, who testified before us. Unfortunately, I cannot name all the others who have taken such a great and consistent interest in this legislation.

Mr. DRINAN. Mr. Speaker, as we consider the religious freedom amendment to the National Labor Relations Act, we must reflect upon the fact that religious freedom lies at the heart of our system of Government.

The issue before us today is a simple one and yet extremely significant: Will we allow employees to exempt themselves from union membership for religious reasons? Mr. Speaker, our entire tradition of tolerance and pluralism argues strongly for a yes vote on the religious freedom amendment offered by Mr. THOMPSON.

The expansion and protection of religious freedom is so central to our democracy that I regard today's issue as clear-cut. By voting yes we are recognizing the deeply felt religious convictions of many of our citizens which prevent them from affiliating with labor organizations. To refuse to acknowledge and make allowances for these legitimate convictions is to say that our system of Government cannot brook dissent or diversity. That is hardly the message this House would want to send to the American people.

Mr. Speaker, I urge my colleagues to recognize the strong religious views held by some of our finest citizens which include conscientious objection to union membership. I urge a yes vote on H.R. 3384.

Finally, I believe the House will pass this legislation today and thereby signal not the end, but only an important step toward a further expansion of religious freedom. I am hopeful that during the next session of Congress we will pass H.R. 8429, which I have introduced and which provides full protection of the law for those individuals whose religious beliefs preclude their working on Saturday. Under present law, employers may force their workers to labor on Saturday, despite any religious objection, under threat of dismissal. To state it bluntly, present law discriminates against Seventh Day Adventists, Orthodox Jews, and other groups who observe a Saturday Sabbath. Present law must be changed.

Mrs. LLOYD of Tennessee. Mr. Speaker, I would like to urge my fellow colleagues to support H.R. 3384, the religious freedom amendments, which we are considering under suspension of the rules today. This bill provides that any employee who belongs to a religion or group historically holding conscientious objections to joining or financially supporting a labor organization shall not be required to do so but instead will be required to pay a sum equal to and in place of periodic union dues and initiation fees to a nonreligious charitable fund.

Our Nation has remained the strong power that it is because the individual's rights and freedoms have been safeguarded and this most assuredly includes the right to freedom of religion under the first amendment. The freedom of religion is an important part of our American heritage and it is essential that we insure through legislation such as H.R. 3384 the protection of human rights and individual dignity.

There are those whose religious convictions will not allow them in good conscience to join labor unions or financially support them even if it results in the loss of a job or dislocation to a State where they would not be placed in such a situation. This amendment will simply give these people the freedom to continue to work under circumstances which will allow them to pursue their religious beliefs in good faith.

I am confident that my colleagues will recognize the importance of this legislation, and the vital need for the protections of constitutional rights which have served as a foundation for the progress of our great country. Let us not deny any American those inherent rights which all of us are so proud to enjoy as citizens of a country which was built on the belief that an individual's rights and freedoms must be our primary concern.

Mr. ERLENBORN. Mr. Speaker, I yield such time as he may consume to the gentleman from Ohio (Mr. ASHBROOK).

(Mr. ASHBROOK asked and was given permission to revise and extend his remarks.)

Mr. ASHBROOK. Mr. Speaker, I rise in support of H.R. 3384. In 1974, the Congress adopted an amendment to the health care institution bill, Public Law 93-360, which provided that if any employee of a health care institution belonged to a religion or sect which historically held conscientious objection to joining or financially supporting a labor organization, the employee would not be required to do so. Instead, where there was negotiated a union security clause requiring membership or financial support, the employee of a health care institution could contribute the equivalent of dues and fees to a nonreligious charity set out in the collective-bargaining agreement, or if none were set out, could contribute to a nonreligious charity of his choice.

This bill expands those protections of religious freedom to all employees, not just employees of health care institutions, but all employees. It is a bill supported by both Republicans and Democrats. It is a bill that comports with the policy of the AFL–CIO set out in 1965. At that time the AFL–CIO executive council officially declared that unions should accommodate themselves to genuine individual scruples.

It has been argued that such a bill is unnecessary since the courts and the National Labor Relations Board have held that membership in a labor organization cannot be compelled under the union security provisions of the act. *Union Starch and Refining Co. v. NLRB*, (186 F. 2d 1008 (1951)). However, some religions or sects oppose financial support as well as membership. Accordingly, this bill makes clear that employees will not have to either join a labor organization or financially support unions if the religion or sect to which they belong prohibit such.

The bill, additionally, solves the problem of the alleged "free rider"—those who receive the benefit of union assistance, but do not contribute to its support. Instead of requiring equivalent support for the union, the bill requires the equivalent of dues and fees be contributed to a nonreligious charity. Therefore, the objecting employee does not get off without some contribution, but allows the employee to pay his fair share in a manner compatible with his conscience. All the employee must do is offer proof of his contribution in a manner set out in rules and regulations by the board.

H.R. 3384, therefore, resolves a long-

standing conflict for employees who are members of various religious or sects which historically hold conscientious objections to joining or financially supporting unions. The conflict of making such employees choose between their religion or their jobs was incompatible with our constitutional rights and rights under the Equal Employment Opportunity Act.

It should be made clear that the religious do not object to unions as such, but they do object to sources of potential conflict, and to membership in organizations other than their church. This bill, which requires contributions to nonreligious charities, does not conflict with the beliefs of these small religious groups. The heritage of this country is based on majority rule with protection of minority rights. This bill recognizes and enhances this heritage.

But, it should also be made clear that the bill does not resolve all our conflicts regarding religious liberty and our national labor laws. However, it should be fairly clear that Congress endorses an accommodation to religious conscience to a degree not yet found in our court and board decisions. Hopefully, we can reach a greater accommodation to our Sabbatarians by the development of the law in the area of reasonable accommodation to an individual's religious beliefs. If not, then the Congress would have to act again.

The chairman of our subcommittee (Mr. THOMPSON) is to be applauded for bringing this bill to the floor. Not long ago, he committed himself to do so, and, consistent with that commitment, we see H.R. 3384 on the floor today. Along with Mr. THOMPSON are others who have worked hard to see this bill enacted, including Mr. ERLENBORN, Mrs. PETTIS, Mr. DON CLAUSEN, Mr. ROBERT DUNCAN, and former Members of Congress, Mr. Floyd Hicks and Mrs. Edith Green, who originally proposed such an amendment to the NLRA. I join them in their efforts and fully support the bill before us today. I urge my colleagues to support it as well.

GENERAL LEAVE

Mr. THOMPSON. Mr. Speaker, I ask unanimous consent that all Members may have 3 legislative days in which to revise and extend their remarks on the bill under consideration.

The SPEAKER pro temore. (Mr. BROWN of California). Is there objection to the request of the gentleman from New Jersey?

There was no objection.

The SPEAKER per tempore. The question is on the motion offered by the gentleman from New Jersey (Mr. THOMPSON) that the House suspend the rules and pass the bill H.R. 3384.

The question was taken.

Mr. ERLENBORN. Mr. Speaker, on that I demand that yeas and nays.

The yeas and nays were ordered.

The SPEAKER pro tempore. Pursuant to clause 3 of rule XXVII, and the Chair's prior announcement, further proceedings on this motion will be postponed.

SILETZ INDIAN TRIBE RESTORATION ACT

Mr. RONCALIO. Mr. Speaker, I move to suspend the rules and pass the bill (H.R. 7259) to restore the Confederated Tribes of Siletz Indians of Oregon as a federally recognized sovereign Indian tribe, to restore to the Confederated Tribes of Siletz Indians of Oregon and its members those Federal services and benefits furnished to federally recognized American Indian tribes and their members, and for other purposes, as amended.

The Clerk read as follows:

H.R. 7259

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Siletz Indian Tribe Restoration Act".

SEC. 2. For the purposes of this Act—

(1) the term "tribe" means the Confederated Tribes of Siletz Indians of Oregon;

(2) the term "Secretary" means the Secretary of the Interior or his authorized representative;

(3) the term "Interim Council" means the council elected pursuant to section 5;

(4) the term "member", when used with respect to the tribe, means a person enrolled on the membership roll of the tribe, as provided in section 4 of this Act; and

(5) the term "final membership roll" means the final membership roll of the tribe published on July 20, 1956, on pages 5454–5462 of volume 21 of the Federal Register.

SEC. 3. (a) Federal recognition is hereby extended to the tribe, and the provisions of the Act of June 18, 1934 (48 Stat. 984) as amended, except as inconsistent with specific provisions of this Act, are made applicable to the tribe and the members of the tribe. The tribe and the members of the tribe shall be eligible for all Federal services and benefits furnished to federally recognized Indian tribes. Notwithstanding any provision to the contrary in any law establishing such services or benefits, eligibility of the tribe and its members for such Federal services and benefits shall become effective upon enactment of this Act without regard to the existence of a reservation for the tribe or the residence of members of the tribe on a reservation.

(b) Except as provided in subsection (c), all rights and privileges of the tribe and of members of the tribe under any Federal treaty, Executive order, agreement, or statute, or under any other authority, which were diminished or lost under the Act of August 13, 1954 (68 Stat. 724), are hereby restored, and such Act shall be inapplicable to the tribe and to members of the tribe after the date of enactment of this Act.

(c) This Act shall not grant or restore any hunting, fishing, or trapping right of any nature, including any indirect or procedural right or advantage, to the tribe or any member of the tribe, nor shall it be construed as granting, establishing, or restoring a reservation for the tribe.

(d) Except as specifically provided in this Act, nothing in this Act shall alter any property right or obligation, any contractual right or obligation, or any obligation for taxes already levied.

SEC. 4. (a) The final membership roll is declared open. The Secretary, the Interim Council, and tribal officials under the tribal constitution and bylaws shall take such measures as will insure the continuing accuracy of the membership roll.

(b)(1) Until after the inital election of tribal officers under the tribal constitution and bylaws, a person shall be a member of the tribe and his name shall be placed on the membership roll if he is living and if—

(A) his name is listed on the final membership roll;

(B) he was entitled on August 13, 1954, to be on the final membership roll but his name was not listed on that roll; or

(C) he is a descendant of a person specified in subparagraph (A) or (B) and possesses at least one-fourth degree of blood of members of the tribe or their Siletz Indian ancestors.

(2) After the initial election of tribal officials under the tribal constitution and bylaws, the provisions of the tribal constitution and bylaws shall govern membership in the tribe.

(c)(1) Before election of the Interim Council, verification of descendancy, age, and blood shall be made upon oath before the Secretary and his determination thereon shall be final.

(2) After election of the Interim Council and before the initial election of the tribal officials, verification of descendancy, age, and blood shall be made upon oath before the Interim Council, or its authorized representative. A member of the tribe, with respect to the inclusion of any name, and any person, with respect to the exclusion of his name, may appeal to the Secretary, who shall make a final determination of each such appeal within ninety days after an appeal has been filed with him. The determination of the Secretary with respect to an appeal under this paragraph shall be final.

(3) After the initial election of tribal officials, the provisions of the tribal constitution and bylaws shall govern the verification of any requirements for membership in the tribe, and the Secretary and the Interim Council shall deliver their records and enrollment matters, to the tribal governing body.

(d) For purposes of section 5 and 6, a member who is eighteen years of age or older is entitled and eligible to be given notice of, attend, participate in, and vote at, general council meetings and to nominate candidates for, to run for any office in, and to vote in, elections of members to the Interim Council and to other tribal councils.

SEC. 5. (a) Within forty-five days after the date of the enactment of this Act, the Secretary shall announce the date of a general council meeting of the tribe to nominate candidates for election to the Interim Council. Such general council meeting shall be held within sixty days after the date of the enactment of this Act. Within forty-five days after such general council meeting the Secretary shall hold an election by secret ballot, absentee balloting to be permitted, to elect nine members of the tribe to the Interim Council from among the nominees submitted to him from such general council meeting. The Secretary shall assure that notice of the time, place, and purpose of such meeting and election shall be provided to members described in section 4(d) at least fifteen days before such general meeting and election. The ballot shall provide for write-in votes. The Secretary shall approve the Interim Council elected pursuant to this section if he is satisfied that the requirements of this section relating to the nominating and election process have been met. If he is not so satisfied, he shall hold another election under this section, with the general council meeting to nominate candidates for election to the Interim Council to be held within sixty days after such election.

(b) The Interim Council shall represent

deal with this very awesome problem of malnutrition and hunger.

Mr. Speaker, this is a worthy resolution. It does not mandate the President to form a Commission on Domestic and International Hunger and Malnutrition. It respectfully requests that the President do so.

I hope the Members will support this resolution overwhelmingly.

The Speaker. I yield whatever time I have remaining to the gentleman from Minnesota (Mr. NOLAN), the sponsor of the resolution.

Mr. NOLAN. Mr. Speaker, the assertion of the gentlewoman from New Jersey (Mrs. FENWICK) that this resolution was written by some group outside the Congress is erroneous. As the prime sponsor of this resolution, I want to assure the gentlewoman and the Members of the House that the resolution was written in consultation with farm groups, with religious groups, with business groups, with a wide variety of public interest groups, with the Office of the President and with the careful assistance of many Members of this House.

Mr. ALEXANDER. Mr. Speaker, the irony of people of our own Nation suffering from malnutrition or starvation when our producers are troubled by unsold quantities of basic foods, such as wheat and rice, is nothing less than a condemnation of our natural resource management and agricultural policies.

While I am a sponsor of the proposal before us, I am troubled about what it does not say about the job of the Commission.

In today's world as a whole, we still have enough fertile land to grow the food people need to survive. The fact is that in too many years we are growing more food in the United States than our system allows us to get into the hands of our people.

The bottlenecks and obstacles between producing food and consuming it come in a Heinz 57 variety.

Our farm production financing system is becoming so inadequate that it discourages small and mid-sized farming operations and encourages concentration of food production in the hands of fewer and fewer people. Since 1970 it is estimated that the farm population of the United States has decreased by 1.5 million persons.

Despite the fact that we are spending billions every year on our transportation networks, increasingly small shares of this investment are going into the parts of the system that connect farms with terminal collecting points such as country grain elevators. The highways over which the food and the materials and equipment for producing it actually move to or from the farm are often in such poor condition that two, three, and four trips must be made to transport loads our trucks have the capability of moving in one trip on adequate pavements.

The world's best Interstate Highway System, rail freight system, and waterway barge system cannot do the job that must be done if the secondary, rural highways are allowed to continue to go to potholes. As it is our highway system is deteriorating 50 percent faster than we repair, rehabilitate, or replace it.

Competition for essential production materials, such as nitrogen, and for processing materials, such as natural gas, is hampering our efforts to manage our food resources.

Conflicts between environmental protection needs and the need to store water supplies to fight droughts such as that which has plagued us during the past year and to control floods such as those which destroyed crops in 1972, hampered planting in 1973 and have caused heavy damage in Arkansas this fall are threatening our food production capacity.

Roller coaster behavior in farm gate prices for rice, soybeans, corn, wheat, beef, poultry, pork, and dairy products caused by uncoordinated Government policies, export embargoes, and moratoriums; labor organization decisions, and unwise speculation in private commodities markets are hampering producers efforts to bring stability to their farming operations.

A relatively new question mark in the future of the U.S. food production system is the increasing share of our farmland that is moving into the hands of foreign investors. In the years ahead, as the gap between food supplies and demand widens, what will be the marketing and production decisions of these landowners? How will these decisions affect our response to domestic and international food needs?

And, one final issue is the money to pay farmers for the food they raise. Many people in our own Nation, as well as those in other nations, simply do not, for one reason or another, have any or enough money to buy the food they need. The question is "Are the programs, such as food stamps and Food for Peace, that we are using now to help erase hunger the right programs?" Can we as a people continue to afford them? In the long run, do these programs harm our announced objective of increasing production, improving food distribution systems, and moving hunger from the endangered species list of problems to the list of extinct problems?

These are by no means all the problems the Commission must address. There are those questions about:

Ways to help food deficit nations improve their ability to grow the food their own people need;

Ways to teach individual families how to be sure the food they are eating is nutritionally balanced;

Ways to bring closer into balance population numbers and food supply numbers; and,

Ways to protect farmland owners from irresistible pressures to allow their acreage to be converted to urban sprawl.

And, the list could go on and on.

What I hope is that the Commission will address itself not only to the needs of consumers but to the needs of producers of food as well. What we must have is a comprehensive and coordinated food production and distribution policy that is equitable to all parties. We do not have such a policy now. Without this kind of policy our chances of overcoming hunger problems are reduced to the vanishing point.

GENERAL LEAVE

Mr. ZABLOCKI. Mr. Speaker, I ask unanimous consent that all Members may have 5 legislative days in which to revise and extend their remarks on House Resolution 784.

The SPEAKER pro tempore. Is there objection to the request of the gentleman from Wisconsin?

There was no objection.

Mr. ZABLOCKI. Mr. Speaker, I have no further requests for time.

The SPEAKER pro tempore. The question is on the motion offered by the gentleman from Wisconsin (Mr. ZABLOCKI) that the House suspend the rules and agree to the resolution (H. Res. 784), as amended.

The question was taken.

Mr. BAUMAN. Mr. Speaker, on that I demand the yeas and nays.

The yeas and nays were ordered.

The SPEAKER pro tempore. Pursuant to clause 3, rule XXVII, and the Chair's prior announcement, further proceedings on this motion will be postponed.

ANNOUNCEMENT BY THE SPEAKER PRO TEMPORE

The SPEAKER pro tempore. Debate has been concluded on all motions to suspend the rules.

Pursuant to clause 3, rule XXVII, the Chair will now put the question on each motion on which further proceedings were postponed, in the order in which that motion was entertained.

Votes will be taken in the following order:

H.R. 3384.

S. 1306.

House Resolution 315.

House Resolution 784.

The Chair will reduce to 5 minutes the time for any electronic votes after the first such vote in this series.

CONSCIENTIOUS OBJECTION TO JOINING A LABOR ORGANIZATION

The SPEAKER pro tempore. The unfinished business is the question of suspending the rules and passing the bill, H.R. 3384.

The Clerk read the title of the bill.

The SPEAKER pro tempore. The question is on the motion offered by the gentleman from New Jersey (Mr. THOMPSON) that the House suspend the rules and pass the bill, H.R. 3384, on which the yeas and nays are ordered.

The vote was taken by electronic device, and there were—yeas 400, nays 7, not voting 27, as follows:

[Roll No. 726]

YEAS—400

Abdnor	Annunzio	Baucus
Addabbo	Applegate	Bauman
Akaka	Archer	Beard, R.I.
Alexander	Armstrong	Beard, Tenn.
Allen	Ashbrook	Bedell
Ambro	Ashley	Bellenson
Ammerman	Aspin	Benjamin
Anderson, Calif.	AuCoin	Bennett
	Badham	Bevill
Anderson, Ill.	Badillo	Biaggi
Andrews, N.C.	Bafalis	Bingham
Andrews, N. Dak.	Baldus	Blanchard
	Barnard	Blouin

Boland	Gammage	Milford
Bonior	Gaydos	Miller, Calif.
Bonker	Gephardt	Miller, Ohio
Bowen	Giaimo	Mineta
Brademas	Gibbons	Minish
Breaux	Gilman	Mitchell, Md.
Breckinridge	Ginn	Mitchell, N.Y.
Brinkley	Glickman	Moakley
Brodhead	Goldwater	Moffett
Brooks	Gore	Mollohan
Broomfield	Gradison	Montgomery
Brown, Calif.	Grassley	Moore
Brown, Mich.	Gudger	Moorhead, Calif.
Brown, Ohio	Guyer	Moorhead, Pa.
Broyhill	Hagedorn	Moss
Buchanan	Hall	Mottl
Burgener	Hamilton	Murphy, Ill.
Burke, Calif.	Hammer-schmidt	Murphy, N.Y.
Burke, Fla.	Hanley	Murphy, Pa.
Burke, Mass.	Hannaford	Murtha
Burlison, Mo.	Hansen	Myers, Gary
Burton, John	Harkin	Myers, John
Burton, Phillip	Harrington	Myers, Michael
Butler	Harris	Natcher
Byron	Harsha	Neal
Caputo	Hawkins	Nedzi
Carney	Heckler	Nichols
Carr	Hefner	Nix
Carter	Heftel	Nolan
Cavanaugh	Hillis	Nowak
Cederberg	Holland	O'Brien
Chappell	Hollenbeck	Oakar
Chisholm	Holt	Oberstar
Clausen, Don H.	Holtzman	Obey
Clay	Horton	Ottinger
Cleveland	Howard	Panetta
Cochran	Hubbard	Patten
Cohen	Huckaby	Patterson
Coleman	Hyde	Pattison
Collins, Tex.	Ichord	Pease
Conable	Ireland	Pepper
Conte	Jacobs	Perkins
Corman	Jeffords	Pettis
Cornell	Jenkins	Pickle
Cornwell	Jenrette	Pike
Cotter	Johnson, Calif.	Pressler
Coughlin	Johnson, Colo.	Preyer
Crane	Jones, N.C.	Price
Cunningham	Jones, Okla.	Pritchard
Daniel, Dan	Jordan	Pursell
Daniel, R. W.	Kastenmeier	Quayle
Danielson	Kazen	Quie
Davis	Kemp	Quillen
de la Garza	Ketchum	Rahall
Delaney	Keys	Railsback
Dellums	Kildee	Rangel
Dent	Kindness	Regula
Derrick	Kostmayer	Reuss
Derwinski	Krebs	Rhodes
Devine	LaFalce	Richmond
Dickinson	Lagomarsino	Rinaldo
Dicks	Latta	Risenhoover
Diggs	Le Fante	Robinson
Dingell	Leach	Rodino
Dodd	Lederer	Roe
Dornan	Leggett	Rogers
Downey	Lehman	Roncalio
Drinan	Lent	Rooney
Duncan, Oreg.	Livingston	Rose
Duncan, Tenn.	Lloyd, Calif.	Rosenthal
Early	Lloyd, Tenn.	Rostenkowski
Eckhardt	Long, La.	Roybal
Edgar	Long, Md.	Rudd
Edwards, Ala.	Lott	Runnels
Edwards, Calif.	Lujan	Ruppe
Eilberg	Luken	Russo
Emery	McClory	Ryan
English	McCloskey	Santini
Erlenborn	McCormack	Sarasin
Ertel	McDade	Sawyer
Evans, Colo.	McEwen	Scheuer
Evans, Del.	McFall	Schroeder
Evans, Ga.	McHugh	Schulze
Evans, Ind.	McKay	Sebelius
Fary	McKinney	Seiberling
Fascell	Madigan	Sharp
Fenwick	Maguire	Shipley
Fithian	Mahon	Shuster
Flippo	Mann	Sikes
Foley	Markey	Simon
Fithian	Marks	Sisk
Flippo	Marlenee	Skelton
Ford	Marriott	Skubitz
Ford, Tenn.	Martin	Slack
Flynt	Mathis	Smith, Iowa
Foley	Mattox	Smith, Nebr.
Ford, Tenn.	Mazzoli	Snyder
Forsythe	Meeds	Solarz
Fountain	Metcalfe	Spellman
Fowler	Meyner	Spence
Fraser	Michel	St Germain
Frenzel	Mikulski	Staggers
Fuqua	Mikva	Stangeland
Stanton	Tucker	Whitley
Stark	Udall	Whitten
Steed	Ullman	Wiggins
Steers	Van Deerlin	Wilson, Bob
Steiger	Vander Jagt	Wilson, C. H.
Stockman	Vanik	Wilson, Tex.
Stokes	Vento	Winn
Stratton	Volkmer	Wirth
Studds	Walgren	Wright
Stump	Walsh	Wydler
Symms	Wampler	Wylie
Taylor	Watkins	Yates
Thompson	Waxman	Yatron
Thone	Weaver	Young, Alaska
Thornton	Weiss	Young, Fla.
Traxler	Whalen	Young, Mo.
Treen	White	Zablocki
Tsongas	Whitehurst	Zeferetti

NAYS—7

Burleson, Tex.	Poage	Waggonner
Gonzalez	Satterfield	
McDonald	Teague	

NOT VOTING—27

Boggs	Ford, Mich.	Krueger
Bolling	Frey	Levitas
Clawson, Del	Goodling	Lundine
Collins, Ill.	Hightower	Roberts
Conyers	Hughes	Rousselot
Corcoran	Jones, Tenn.	Treen
D'Amours	Kasten	Walker
Edwards, Okla.	Kelly	Wolff
Flowers	Koch	Young, Tex.

The Clerk announced the following pairs:

Mrs. Boggs with Mr. Del Clawson.

Mr. Jones of Tennessee with Mr. Corcoran of Illinois.

Mr. Koch with Mr. Goodling.

Mr. Wolff with Mr. Rousselot.

Mr. Roberts with Mr. Treen.

Mr. Lundine with Mr. Edwards of Oklahoma.

Mr. Levitas with Mr. Walker.

Mr. Ford of Michigan with Mr. Krueger.

Mr. Conyers with Mr. Kelly.

Mr. D'Amours with Mr. Kasten.

Mr. Flowers with Mrs. Collins of Illinois.

Mr. Hughes with Mr. Hightower.

Mr. GONZALEZ and Mr. McDONALD changed their vote from "yea" to "nay."

So (two-thirds having voted in favor thereof) the rules were suspended and the bill was passed.

The result of the vote was announced as above recorded.

A motion to reconsider was laid on the table.

ANNOUNCEMENT BY THE SPEAKER PRO TEMPORE

The SPEAKER pro tempore. Pursuant to the provisions of clause 3(b)3 of rule XXVII, the Chair announces that he will reduce to a minimum of 5 minutes the period of time within which a vote by electronic device may be taken on all of the additional motions to suspend the rules on which the Chair has postponed further proceedings.

SMALL BUSINESS EMERGENCY DROUGHT DISASTER LOAN ACT OF 1977

The SPEAKER pro tempore. The unfinished business is the question of suspending the rules and passing the Senate bill S. 1306, as amended.

The Clerk read the title of the Senate bill.

The SPEAKER pro tempore. The question is on the motion offered by the gentleman from Iowa (Mr. SMITH), that the House suspend the rules and pass the Senate bill S. 1306, as amended, on which the yeas and nays are ordered.

The vote was taken by electronic device and there were—yeas 234, nays 170, not voting 30, as follows:

[Roll No. 727]

YEAS—234

Addabbo	Florio	Nolan
Akaka	Flynt	Nowak
Alexander	Foley	Oakar
Anderson, Calif.	Ford, Tenn.	Oberstar
Andrews, N.C.	Fountain	Obey
Annunzio	Fraser	Panetta
Archer	Frenzel	Patten
Ashley	Gammage	Pattison
Aspin	Gephardt	Pease
AuCoin	Giaimo	Pepper
Baldus	Gibbons	Pickle
Barnard	Ginn	Pike
Baucus	Glickman	Poage
Beard, R.I.	Gore	Preyer
Bedell	Hall	Price
Bellenson	Hamilton	Quayle
Benjamin	Hanley	Rahall
Bennett	Hannaford	Reuss
Bevill	Harkin	Richmond
Biaggi	Harrington	Rodino
Blanchard	Harris	Rogers
Blouin	Harsha	Roncalio
Bonker	Hawkins	Rose
Bowen	Heckler	Rosenthal
Brademas	Heftel	Rostenkowski
Breaux	Holland	Roybal
Breckinridge	Howard	Rudd
Brinkley	Huckaby	Russo
Brodhead	Ichord	Ryan
Brooks	Ireland	Sarasin
Brown, Calif.	Jacobs	Sawyer
Broyhill	Jenkins	Scheuer
Buchanan	Johnson, Calif.	Schroeder
Burke, Calif.	Johnson, Colo.	Seiberling
Burke, Mass.	Jones, N.C.	Sharp
Burleson, Tex.	Jones, Okla.	Shipley
Burlison, Mo.	Jordan	Simon
Burton, Phillip	Kastenmeier	Sisk
Butler	Kostmayer	Skelton
Carney	LaFalce	Slack
Carr	Le Fante	Smith, Iowa
Cavanaugh	Lederer	Snyder
Chisholm	Lehman	Solarz
Clay	Lloyd, Calif.	St Germain
Cochran	Lloyd, Tenn.	Stanton
Collins, Tex.	Long, La.	Stark
Conte	Long, Md.	Steed
Corman	McCloskey	Steiger
Cornell	McCormack	Stockman
Cotter	McDonald	Stokes
Crane	McFall	Stratton
Cunningham	McHugh	Studds
Danielson	McKinney	Stump
Davis	Maguire	Symms
de la Garza	Mahon	Taylor
Delaney	Mann	Thompson
Dellums	Markey	Thornton
Derrick	Mathis	Tsongas
Derwinski	Mattox	Tucker
Dicks	Mazzoli	Udall
Diggs	Meeds	Ullman
Dingell	Metcalfe	Van Deerlin
Dodd	Meyner	Vanik
Drinan	Mikulski	Vento
Duncan, Oreg.	Mikva	Volkmer
Early	Milford	Waggonner
Eckhardt	Miller, Calif.	Watkins
Edwards, Ala.	Mineta	Weaver
Edwards, Calif.	Mitchell, Md.	Whitten
English	Moakley	Wiggins
Erlenborn	Moffett	Wilson, C. H.
Evans, Del.	Mollohan	Wilson, Tex.
Evans, Ind.	Montgomery	Wright
Fary	Moorhead, Pa.	Yates
Fascell	Murphy, Ill.	Young, Mo.
Fenwick	Murphy, N.Y.	Zablocki
Fithian	Myers, John	Zeferetti
Flippo	Myers, Michael	
	Nedzi	

NAYS—170

Abdnor	Boland	Cohen
Allen	Bonior	Coleman
Ambro	Broomfield	Conable
Ammerman	Brown, Mich.	Cornwell
Anderson, Ill.	Brown, Ohio	Coughlin
Andrews, N. Dak.	Burgener	Daniel, Dan
Applegate	Burke, Fla.	Daniel, R. W.
Armstrong	Burton, John	Dent
Ashbrook	Byron	Devine
Badham	Caputo	Dickinson
Badillo	Carter	Dornan
Bafalis	Cederberg	Downey
Bauman	Chappell	Duncan, Tenn.
Beard, Tenn.	Clausen, Don H.	Edgar
Bingham	Cleveland	Emery
		Ertel